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021
No. 2785

United States Circuit Court of Appeals
NINTH CIRCUIT

O. E. GERNERT,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

In Error to the District Court of
the United States

For the District of Oregon

Filed

APR 28 1916

F. D. Monckton,
Clerk.

No. _____

United States Circuit Court of Appeals
NINTH CIRCUIT

O. E. GERNERT,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**In Error to the District Court of
the United States**

For the District of Oregon

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*United States Circuit Court of Appeals for the
Ninth Circuit.*

O. E. GERNERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD:

Mr. Robert F. Maguire,

Corbett Building, Portland, Oregon,

For the Plaintiff in Error.

Mr. Clarence L. Reames,

United States Attorney, Post Office Building,

Portland, Oregon,

For the Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to Clarence L. Reames, United States Attorney for the District of Oregon.

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the District of Oregon, wherein O. E. Gernert is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 29th day of March, in the year of our Lord one thousand nine hundred and sixteen.

R. S. Bean,
United States District Judge.

Filed March 29, 1916.

G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

United States of America,

Plaintiff,

vs.

O. E. Gernert,

Defendant.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the
Honorable, the Judge of the District Court of the
United States for the District of Oregon.

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before the Honorable Robert S. Bean, United States District Judge, between the United States of America, plaintiff and defendant in error, and O. E. Gernert, defendant and plaintiff in error, a manifest error hath happened to the great damage of said plaintiff in error as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,

to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 3rd day of April, in the year of our Lord, one thousand nine hundred and sixteen.

(Seal)

G. H. Marsh,

Clerk, U. S. District Court for the District of Oregon.

By F. L. Buck, Deputy.

Service of the above Writ of Error made this 3rd day of April, in the year of our Lord, one thousand nine hundred and sixteen, upon the District Court of the United States, for the District of Oregon, by filing with me as Clerk of said Court, a duly certified copy of said Writ of Error.

G. H. Marsh,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck, Deputy.

Filed April 3, 1916.

G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

November Term, 1914.

BE IT REMEMBERED, That on the 27th day of February, 1915, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment in words and figures as follows, to-wit:

INDICTMENT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E.
Gernert, B. F. Bonnewell, H. M. Todd, Joseph
Hunter, O. L. Hopson, P. E. Muraine, and Oscar
A. Campbell,

Defendants.

INDICTMENT for Violation of Section 37 of the
Penal Code.

United States of America,

State and District of Oregon,—ss.

The Grand Jurors of the United States of America for the District of Oregon, duly impaneled, sworn and charged to inquire in, of and concerning the commission of crime within and for said district, upon their oaths and affirmations do allege, present, find and charge:

That at and during all of the times and dates in this indictment mentioned, stated, designated and specified, United States Cashier Company has been and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon with its principal office and place of business in the City of Portland, in the County of Multnomah and within the State and District of Oregon aforesaid.

That at all of the times between the 1st day of September, 1910, and the 31st day of January, 1914, the defendant herein, Frank Menefee, was a duly elected, qualified and acting director of said corporation; that at and during all of the times between the 1st day of September, 1910, and the 31st day of January, 1914, he, the said defendant, Frank Menefee, was the duly elected, qualified and acting President of said corporation; that at and during all of the times between the 28th day of September, 1910, and the 31st day of January, 1914, he, the said defendant, Frank Menefee, was the duly elected, qualified and acting General Manager of said corporation.

That at and during all of the times and dates between the 1st day of September, 1910, and the 1st day of November, 1912, the above named defendant, F. M. LeMonn, was the duly elected, qualified and acting sales manager of said corporation.

That at and during all of the times and dates between the 1st day of January, 1911, and the 1st day of April, 1912, the defendant, O. E. Gernert, was an agent

and salesman for said corporation, and the duly appointed, qualified and acting assistant sales manager of said corporation.

That at and during all of the times and dates between the 15th day of April, 1911, and the 31st day of January, 1914, the defendant, B. F. Bonnewell, was the duly elected, qualified and acting fiscal agent for the said corporation, and an agent and salesman for said corporation.

That at and during all of the times and dates between the 15th day of April, 1911, and the 1st day of December, 1913, the defendant, H. M. Todd, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 26th day of May, 1911, and the 31st day of January, 1914, the defendant, Joseph Hunter, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 23rd day of November, 1910, and the 1st day of July, 1913, the defendant, O. L. Hopson, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 6th day of March, 1911, and the 31st day of January, 1914, the defendant, P. E. Muraine, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 12th day of June, 1911, and the 31st day of January, 1914, the defendant, Oscar A. Campbell, was a duly elected, qualified and acting director of said corporation; that at and during all of the times and dates between the 30th day of January, 1912 and the 31st day of January, 1914, he, the said defendant, Oscar A. Campbell, was the duly elected, qualified and acting vice-president of said corporation.

That at and during all of the times and dates between the 9th day of June, 1913, and the 31st day of January, 1914, the defendant, Thomas Bilyeu, was a duly elected, qualified and acting director of said corporation.

That at and during all of the times and dates between the 1st day of September, 1910, and the 31st day of January, 1914, the capital stock of said corporation amounted to the sum of One million two hundred thousand dollars divided and segregated by the Articles of Incorporation of said corporation into One hundred twenty thousand shares of the par value as fixed and stated in said Articles of Incorporation of Ten Dollars for each and every of said shares.

That at the City of Portland within the County of Multnomah and within the State and District of Oregon, and on or about the 1st day of September, 1910 (the exact date being to the Grand Jurors unknown), the defendants herein, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M.

Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, did then and there unlawfully, wilfully and feloniously conspire, confederate and agree together, and with divers other persons to the Grand Jurors unknown, to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud to-wit: Section Two Hundred Fifteen of the Criminal Code of the United States; that is to say: the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, did then and there unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, and with divers other persons to the Grand Jurors unknown, to devise and execute a scheme and artifice to defraud to be effected by means of the Postoffice establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises from Harry Wainwright, John Marshall, C. F. L. Smith, Francis Gzella, A. A. Milliken, J. W. Zufall, Harry I. Carruthers, R. O. Holmes, John Straub, T. W. Harris, L. H. Robinson, J. C. Flaherty, O. K. Clarke, E. W. Draper, James Hansen, W. B. Morse, E. D. Paine, R. L. Anderson, E. A. Mulkey, C. A. McMahon, R. L. Robison, E. O. Tobey, S. M. Sim, J. W. Brett, Bert Sallaberry, H. J. Johnson, G. A. Frees, Ole G. Vinger, Herman A. C. Ludecke, William Herzog, Forbes Weisman, Henry W. Axford, T. Warsop Cooper, Annabelle McRay, Charles E. Hatfield, Matilda O. Johnson, Conrad

Stafrin, John Meyers, J. H. Manis, A. L. Pierce, John Irrigoin, Fred Williams, H. J. Shannon, Emma G. Hedges, Mary E. Hall, W. H. Garl, Thomas T. Davies, M. C. Carlson, George F. Cobb, Edward Klein, W. T. Roberts, John H. Ballagh, J. J. Bauer, H. T. Johnson and A. M. Armstrong (the last named fifty-five persons being hereinafter in this indictment designated, termed and called "INVESTORS"), and from divers other persons to the Grand Jurors unknown, and the public generally, by inducing, inciting and procuring the said "INVESTORS" and divers other persons to the Grand Jury unknown, and the public generally, to open communication with the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell and with the said United States Cashier Company, a corporation, and by inducing, inciting and procuring the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, to purchase from the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and from said corporation, namely: United States Cashier Company, the shares of stock of said corporation, and to pay over, deliver and to transfer to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, namely: United States

Cashier Company, in exchange and payment for said shares of stock the money and property of the said "INVESTORS" and of divers other persons to the Grand Jurors unknown, the payment of said sums of money to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, namely: United States Cashier Company, and the transfer of said property to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, namely: United States Cashier Company, to be induced, incited and procured by the false and fraudulent representations of the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, to be made to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine

and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, carried out, carried on and effected by the further means, methods, manner and plans, that is to say: the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell would cause, induce, incite and procure the said "INVESTORS" and many and divers other persons to the Grand Jurors unknown, and the public generally to pay over and to deliver to and to transfer to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation in payment of and in exchange for the shares of stock of said corporation, United States Cashier Company, money and property of the value of more than the sum of One million dollars, which said payment of said money and which transfer of said property was to be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell induced, incited, procured and obtained by the dishonest, fraudulent and false representations and promises hereinafter set forth, all

to be made to the said "INVESTORS" by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to divers other persons to the Grand Jurors unknown, and the public generally, and to swindle, cheat and defraud said "INVESTORS" and each, every and all thereof, and various and sundry other persons to the Grand Jurors unknown, and the public generally, out of all of the said sums of money and the said property that the said "INVESTORS" and various other persons to the Grand Jurors unknown and the public generally, should pay over and deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or either thereof, or to the said corporation, namely: United States Cashier Company.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell carried out, carried on and effected by the further means, methods,

manner and plans, that is to say: that for the purpose of inducing, inciting and procuring the said "INVESTORS" and various and divers other persons to the Grand Jurors unknown and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, money and property in exchange and payment therefor, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, would falsely and fraudulently and by means of printed advertisements to be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, inserted in newspapers, in pamphlets, in catalogues, in circulars and in letters, and to be written in letters, which said newspapers, pamphlets, catalogues, circulars and letters were to be by the said defendants transmitted and caused to be transmitted and sent by and through, and by means of the Postoffice establishment of the United States, to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown, and by words to be orally spoken by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell,

represent, pretend and promise that the said corporation, namely: United States Cashier Company owned the patents to a certain "CHANGE COMPUTING MACHINE," a certain "BANK CASHIER MACHINE," a certain "LIGHTNING CHANGE MAKER," a certain "CURRENCY PAYING MACHINE" and a certain "NEW STYLE ADDING MACHINE," and that the said corporation, namely: United States Cashier Company, was engaged in the business of manufacturing and selling said machines, and each, every and all thereof; that on account of the said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock of said corporation, namely: United States Cashier Company, were of great commercial value and that large dividends would be by said corporation declared and paid thereon to the said "INVESTORS" and to all other persons who should purchase the same from the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or from the said corporation, namely: United States Cashier Company; that said corporation, namely: United States Cashier Company would declare and pay to all of said "INVESTORS," and to divers other persons to the Grand Jurors unknown, and to all persons who should purchase the shares of stock from said corporation large and certain dividends upon said stock within six months from the date that any of said persons should purchase any of said shares of stock from said defendants Frank

Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, or either thereof, or from said corporation, namely: United States Cashier Company; that the said corporation, namely: United States Cashier Company, was the owner and in the possession of large bona fide orders for the purchase of said machines and that on account of said orders for the said machines the said corporation would make a large and certain profit; that the financial condition of the said corporation, namely: United States Cashier Company, was excellent, and that the assets of said corporation, namely: United States Cashier Company, far exceed in value the total amount of the liabilities against and owned by said corporation, namely: United States Cashier Company; that a certain large amount of the capital stock of said corporation, namely: United States Cashier Company, the exact amount of the same being to the Grand Jurors unknown, which said stock would be offered for sale to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown and the public generally, belonged to and was the property of the said corporation, namely: United States Cashier Company, and that the money derived from the sale thereof would be by said corporation invested and used in such a manner as to increase the assets of said corporation, namely: United States Cashier Company, and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said ma-

chines; that inasmuch as the assets of said corporation, namely: United States Cashier Company, exceeded and was greater than the liabilities of said corporation, the said defendant Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, were justified in raising and increasing the selling price of said shares of stock from the said par value of Ten Dollars each to a selling price of Eleven Dollars each; from a selling price of Eleven Dollars each to a selling price of Twelve Dollars and Fifty cents each; from a selling price of Twelve Dollars and Fifty cents each to a selling price of Fifteen Dollars each; from a selling price of Fifteen Dollars each to a selling price of Twenty Dollars each; from a selling price of Twenty Dollars each to a selling price of Thirty Dollars each; and from a selling price of Thirty Dollars each to a selling price of Fifty Dollars each.

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, neither the said corporation, namely: United States Cashier Company, nor any of said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, owned the patents to said certain "CHANGE COMPUTING

MACHINE," or said certain "LIGHTNING CHANGE MAKER," or said certain "CURRENCY PAYING MACHINE," or said certain "NEW STYLE ADDING MACHINE," or either thereof; and

Whereas, in truth and in fact and as the defendant Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, and each, every and all thereof, at and during and between all the time and dates mentioned, specified and stated in this indictment, then and there well knew, the said corporation, namely: United States Cashier Company was not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock; and

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment then and there well knew, the said shares of stock and each, every and all thereof, were of very little value and of practically no value whatsoever, and said shares of stock and each, every and all thereof were practically worthless; and

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment then and there well knew, no dividends whatsoever would ever be by said corporation, namely: United States Cashier Company, either declared or paid to the said "INVESTORS," or to any other person who should purchase the said shares of stock by either the said corporation, namely: United States Cashier Company, or by any of the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell; and

Whereas, in truth and in fact, and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment then and there well knew, none of the said "INVESTORS," or any other person who should purchase said shares of stock, would ever receive, either from said corporation, namely: United States Cashier Company, or from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hun-

ter, O. L. Hopson, P. E. Muraine, or Oscar A. Campbell, any dividend whatsoever; and

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment then and there well knew, the said corporation, namely: United States Cashier Company, was neither the owner nor in the possession of the said alleged bona fide orders for the purchase of said machines; and

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the financial condition of said corporation, namely: United States Cashier Company, was not excellent, but on the contrary at and during all of the times and dates mentioned, specified and stated in this indictment, and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, then and there well knew, the said corporation, namely: United States Cashier Company, was absolutely insolvent; and

Whereas, in truth and in fact, and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the value of the assets of said corporation, namely: United States Cashier Company, amounted to a sum much less than the total amount of the liabilities against and owed by said corporation, namely: United States Cashier Company; and

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, a very large amount of the shares of stock of said corporation, namely: United States Cashier Company, which the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell were to in a manner and form as hereinbefore alleged represent as being the property of the said corporation, namely: United States Cashier Company, consisted of shares of stock owned by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph

Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, and all of the sums of money and all of the property received on account of the sale thereof would be appropriated by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, and none of the same or any part thereof would be paid into the treasury of the said corporation, namely: United States Cashier Company, to be used by it, either for increasing the assets of said corporation, or otherwise; and

Whereas, in truth and in fact, and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, none of the said defendants, or any thereof, were at any time on account of the financial condition of said corporation justified in either raising or increasing the selling price of said shares of stock or any thereof; and

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and states in this indictment, then and there well knew, each and every person who should purchase any of said shares

of stock from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or from said corporation, namely: United States Cashier Company, would suffer and sustain a loss on account of said transaction of all sums of money which any of said persons should pay over or deliver to said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or to said corporation, namely: United States Cashier Company, in exchange or payment for said shares of stock.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy so entered into by said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, carried out, carried on and effected by the further means, methods, manner and plan, that is to say: that for the purpose of inducing, inciting and procuring the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, to purchase

said shares of stock from said corporation and from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell and to pay over and deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, money and property in exchange and in payment therefor, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell would from time to time during the existence of said conspiracy, fraudulently and dishonestly publish and cause to be published, false and untrue written and printed statements of the assets of said corporation, and false and untrue written and printed statements of the liabilities owed by said corporation, and false and untrue written and printed statements of the financial condition of said corporation. That in said false and untrue statements of the assets of said corporation, and in each, every and all thereof, the assets of said corporation would be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, stated to be sums greatly in excess of the true value of all of the assets of said corporation; that in said false and untrue statements of the liabilities owed by said corporation, and in said false and untrue statements of

the financial condition of said corporation and in each, every and all thereof, there would be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, omitted therefrom liabilities owed by said corporation amounting to more than the sum of One half million dollars.

That it was a further part and portion of said wilful, unlawful and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be carried out, carried on and effected by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, selling said shares of stock to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown, in the following states, namely: Oregon, Washington, California, Idaho, Montana, Wyoming, Utah, Texas, Iowa, North Dakota, Michigan, Illinois, Colorado, New York, and many and divers other states to the Grand Jurors unknown.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn,

Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, that the said defendants would so manage and control the business affairs of said corporation, namely: United States Cashier Company, to the end that more than twenty-five per cent of all of the sums of money which should be by the said "INVESTORS" and by divers others persons to the Grand Jurors unknown, and by the public generally, paid over, delivered and transferred to said corporation, namely: United States Cashier Company, and to said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, in exchange and payment for said shares of stock, would be appropriated by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell to their own use and gain.

That it was a part and portion of said unlawful, wilful, and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Ger-

nert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell carried out, carried on and effected by the further means, methods, manner and plans, that is to say: that for the purpose of inducing, inciting and procuring the said "INVESTORS" and various and divers other persons to the Grand Jurors unknown, and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, and to the said corporation, namely: United States Cashier Company, money and property in exchange and payment therefor, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, would increase the selling price of said shares of stock from the said par value of Ten Dollars each to a selling price of Eleven Dollars each; from a selling price of Eleven Dollars each to a selling price of Twelve Dollars and Fifty cents each; from a selling price of Twelve Dollars and Fifty cents each to a selling price of Fifteen Dollars each; from a selling price of Fifteen Dollars each to a selling price of Twenty Dollars each; from a selling price of Twenty Dollars each to a selling price of Thirty Dollars each; and from a selling price of Thirty Dollars each to a selling price of Fifty Dollars each.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy, so entered into

by the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, to execute the said scheme and artifice to defraud, and to attempt so to do by placing and causing to be placed in the Post Office of the United States, at Portland, in Multnomah County, Oregon, and causing to be delivered by the Post Office establishment of the United States, the said newspapers, pamphlets, catalogues, circulars and letters, and other letters to be written by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, which said letters would request the said "INVESTORS" and divers other persons to the Grand Jurors unknown, to remit and to pay to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to said corporation, namely: United States Cashier Company, money in payment and exchange for said shares of stock, all of said newspapers, pamphlets, catalogues, circulars, and letters, to be sent and delivered by the Postoffice establishment of the United States to the persons to whom addressed in pursuance of said conspiracy.

That it was a part and portion of said wilful, unlawful and felonious conspiracy so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M.

Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that the said conspiracy, combination and agreement aforesaid should and would continue from the said 1st day of September, 1910, until and including the 1st day of January, 1915; that said conspiracy was to be a continuing conspiracy, and that it was to continue at all times between the 1st day of September, 1910, until and including the 1st day of January, 1915, and that at and during all of the times and dates, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell would continue to be parties to said conspiracy and would continue to commit the said acts, and crimes hereinbefore set forth in detail.

That the said wilful, unlawful and felonious conspiracy, combination and agreement, aforesaid, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, on or about the 1st day of September, 1910, continued from the date of said conspiracy until and including the 1st day of January, 1915; that at and during all of the times and dates between the said 1st day of September, 1910, and the 1st day of January, 1915, said wilful, unlawful and felonious conspiracy, combination and agreement was continually in existence and in operation, and at and during all of said times the said defendants Frank Menefee, F. M.

LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell continued to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the said crime hereinbefore set forth in detail.

1. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, B. F. Bonnewell, did afterwards and on, to-wit: the 6th day of February, 1914, at Portland, Oregon, and within the jurisdiction of this Court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit: the United States Postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. Bert Sallaberry at Elmdale, Montana, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

“Portland, Oregon,
Feb. 6th, 1914.

Mr. Bert Sallaberry,
Elmdale, Montana.

Dear Sir:

As per your agreement with me you were to send me Five Hundred dollars more to apply on your note before this date providing I extended One thousand dollars until shearing time in 1914. So send the above amt by return mail or I will have to turn the note over to an Attorney for Collection and that means a lot of costs.

Yours Resp.

B. F. Bonnewell.

1108 E. Flanders St., Portland, Oregon.”

which said letter had theretofore and on February 6, 1914, been written and executed by the said defendant B. F. Bonnewell; with the intent then and there in the said defendant B. F. Bonnewell, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Elmdale, Montana; and which said letter was then and there of and concerning the afore-said scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell,

had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

2. And the Grand Jurors, aforesaid, upon their oaths and affirmation, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to-wit, the 23rd day of July, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit: the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. E. Klein, at Everett Building, No. 4th Avenue & 17th St., New York, N. Y., and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary.
F. H. Gloyd	F. M. LeMonn,
Treasurer.	Gen. Sales Manager.

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing Change-making, Recording
Coin-paying Machines.

Automatic Cashier for	Visible Listing and
Banks, Pay Rolls, etc.	Adding Machine.

Automatic Change-computing Machine for De-
partment and Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon,

July 23, 1912.

Mr. E. Klein,
Everett Building,
No. 4th Avenue & 17th St.,
New York, N. Y.

Dear Sir:

Your letter of the 18th instant is received and in answer will say that the writer had quite a talk with Mr. Levi when he was here in Portland and we showed him our factory and gave him such information as we could. He was quite busy with his duties at the Elks Convention and we were not able to show him around as extensively as we would liked to have done.

In regard to stock, Mr. Levi asked us to make a proposition with reference to terms, etc., but did not

indicate what kind of a proposition would be satisfactory to you. With reference to terms, I can furnish you with fifty shares of stock at the rate of \$15 per share as stated to you in our letter of June 21st, and also can arrange to cancel another subscription which was sold at \$15 and turn that over to you also. In both these cases the parties have been unable so far to meet their payments and one we are ready to cancel and the other we will cancel at once if we hear from you favorably and you wish to take it over. We probably would have to cancel it anyway.

As to terms, we would like to have you take this stock as nearly on a cash basis as possible for the reason that it is now while we are extensively engaged in manufacturing dies, having arranged with Sloan & Chace of Newark, N. J., for several thousand dollars worth to be made as fast as they can do the work, and also keeping up the work of die making and the work we can do on the manufacture of machines prior to getting all of our dies, that large demands are made on us for ready cash. Also at this season of the year, while of course an amount of this kind is not sufficient to cause any great or serious difference, we would like to keep our reserve fund up to as high a point as possible as collections, both personal and for the company, are much slower now than they will be later in the season after sixty or ninety days. However, we can allow you to pay one-half the amount down, being the amount we offered you in our June 21st letter, and will give you sixty to ninety days on the balance, you to give us

E. Klein—Page 2.

your note for the amount. We trust this arrangement will be satisfactory to you.

We recently sent you a report of the stockholders' meeting which I hope you received all right. We have been continuing our work stronger than ever since the annual meeting and since the report was written, and while of course it is a large and expensive undertaking, we are in such condition that we can see the daylight ahead both as to time and the financial support necessary to carry our undertaking to a successful termination. In fact, there is no question now confronting us which we will not be able to overcome without serious inconvenience and the getting of our machines on the market at an early date is absolutely assured.

We are also developing a Currency Paying Machine which we have to a point of demonstrating so that we know it will meet the approval of the commercial world, and this with our Computing Machine and the small Change Maker, which we are also getting ready for the market, will make a family of machines that cannot fail to give profitable returns to our investors.

Of course, at this time we are confining all of our effort so far as the manufacturing end is concerned, to the Bank Cashier machine as scattering our efforts in so many directions would result in unnecessary delay in getting to the market with our product.

However, the standardizing and developing of other models is being carried forward and now that the standardizing of our commercial Cashier is practically completed, another one of our machines will be taken up and placed in form for commercial manufacture. Our subsequent models, of course, can be handled much quicker and with less outlay than our first machine inasmuch as the standardizing of the Cashier alone works out the standardizing and development of something like eighty per cent of the other models.

Kindly let us hear from you as soon as possible so we will know whether you are going to take this stock.

Yours faithfully,

UNITED STATES CASHIER COMPANY,

Frank Menefee,

FM-HG

President."

which said letter had theretofore and on July 23, 1912, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee, with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at New York, New York; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said de-

fendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

3. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards, and on, to wit: the 7th day of June, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously, place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to wit: the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Dr. A. A. Milliken, at Fort Jones, Calif., and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary.
F. H. Gloyd,	F. M. LeMonn,
Treasurer.	Gen. Sales Manager.

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing, Change-Making, Recording
Coin-Paying Machines.

Automatic Cashier for	Visible Listing and
Banks, Pay Rolls, etc.	Adding Machine.

Automatic Change-Computing Machine for De-
partment and Retail Stores, etc.

Home Office Lewis Building.

Portland, Oregon,

June 7, 1912.

Dr. A. A. Milliken,
Fort Jones, Calif.

Dear Sir:

Replying to your letter received today and also confirming our wire will say that I will give you a statement of the patents and applications owned and controlled by this Company. You will notice we have designated them as case A, B, etc.: This for our convenience in reference to letters or telegrams to our attorneys in Washington. You will also notice that in Case A^o and Case B. patents have been issued. These are assigned on the records of Washington direct to this Company. Cases A., C. and D. are at this time allowable. In other words the claims have been granted by the department and

we have been duly notified to that effect and we can have the patents allowed and issued any time on payment of the final government fee of \$15 each. These cases we are holding unissued for reason that the life of the patents does not commence to run so long as they are unissued and we can also rewrite our claims, broadening them as the machine develops so as to strengthen it in every respect and finally have issued a patent much broader in its scope.

In other cases the applications are on file with perhaps one or two minor exceptions and have been regularly assigned, at the time application was filed, to this Company. To be absolutely explicit as to the ownership of the patents will say that the title to all of these patents and applications is in the United States Cashier Company; no contract existing that can in any manner forfeit them to any other person. Moreover, they are paid for in full at this time, with the exceptions of about \$25,000 on our Bilyeu contract, which is not yet due. Non-payment of the amount due would not effect the Company's title or right to the patents. We mention this to be explicit that no one has any claim upon our patents whatever, but of course the small balance unpaid will be

Dr. A. A. Milliken———#2.

readily taken care of and is not an embarrassing indebtedness against the Company at all.

The cases referred to are as follows

Case AO

This application has resulted in Letters Patent No. 886,307, issued to Thomas I. Potter, April 28, 1908, regularly assigned to the Company, and covers particularly a selective mechanism of the type using a selector plate or plates traversing the path of movement of the ejecting devices, and controlling the operativeness or inoperativeness of the same. The patent does not limit us to handle controlling means, as we are at liberty to employ key mechanism instead.

Case A.

This application is directed to the original Bilyeu invention and especially the arrangement of parts including the selector, ejector and actuator devices which are used in an analogous arrangement in our latest machine.

Case B.

Letters Patent No. 985,135, issued to Thomas Bilyeu and William S. Overlin February 28, 1911, have resulted from this application and protects quite broadly a later embodiment of the selector mechanism compromising selectors which set the ejectors in operative position. Our new machines will employ the subject-matter of this patent quite fully as we have found it unnecessary to depart therefrom.

Case C.

This is an application of Messrs. Bilyeu, Overlin and Gridley, and is directed particularly to the special type of rotary actuator identically as employed in the Overlin Computer. We have some very valuable claims in this application to said subject-matter, and furthermore, to the actuator mechanism as associated broadly with the printing mechanism and key release mechanism.

Case D.

This is an application by the same inventors as in Case "C," and is really to a division of Case "C," covering the printing mechanism embodying the reciprocable type bars and indexing means therefor. We adhere to this general idea in the White Cashier.

Dr. A. A. Millikan———3.

Case E.

This application is designed to cover the Bilyeu Change-Maker or Computer, a machine incorporating the selector principle of the machine of application, Case "B" but modified only to afford a computing or subtracting action.

Case F.

The street car machine is the subject-matter of this application and the claims are especially directed to the construction whereby the handle or actuator of the other machine is dispensed with and

the keys are used to initially select and subsequently eject the coins by a very simple but extremely effective co-operation of the keys with the ejectors.

Case G.

This is an application by William S. Overlin to cover the bill paying mechanism alone or as used in combination with a coin paying section, the mechanism being capable of handling the bills in flat condition necessary from a commercial standpoint.

Case H.

The machine of this application is the Overlin computer or change-maker, and the mechanism covers computing means for mechanically subtracting or computing to eject coins representing the difference between the amount received and the amount of purchase.

Case I.

This is the application for the White Bank Cashier in its completed commercial form and while the machine includes certain mechanisms of the several applications before enumerated in addition broad protection is being obtained for the idea of combining an adding section with a coin-paying section so that, if desired, the adding section may be used alone as an ordinary adding machine or may even be constructed and used as an adding machine without being attached or combined with a coin paying mechanism. I feel that this application is one of the most important of all our cases. While

it will adhere in many respects to other applications granted or allowable, it will fully cover all of the principles of the machine in its final, developed commercial form. From our research, we know that the principles of the design and construction of this machine particularly, will be fully protected in every respect. Furthermore, the design and mechanism used in this machine will control in all other machines placed upon the market by the company, especially the computing machine, so that the protection afforded by our application for patent, as well as the mechanical standardizing and development of the

Dr. A. A. Millikan———#4.

machine will answer almost entirely in the completion of our other models.

Case K.

The general design of the money handling machine involving the relative positions of the coin receptacles, open money chute common to all of said receptacles, bank or bank keys at the right of said receptacles and operating handle at the right extremity of the machine, is the subject-matter of this application.

Case L.

This application is directed to the special replenishing alarm associated with all of the receptacles and affording a signal to warn the operator of the

machine when the supply of coins in the receptacle is diminished to a predetermined point. This alarm is used in the White Cashier but is being covered separately since it is adapted for application to any money handling machine of the general type of our cashier.

Case M.

This application is on our Currency Paying Machine, which is an improvement and practically speaking, new and original as affecting the handling of currency. Before taking this as the method of handing out paper we have had a search made by our attorneys at Washington and we are advised that we will be able to obtain the broadest protection upon this character of machine, it embodying an entirely new principle as applied to the handling of paper money, and the only method handling it which, in my opinion, would prove a commercial success. We have not had a description of this machine or the principle by which we expect to handle currency therefore, we beg to advise you that this machine will handle currency in flat condition, without any necessity of loading the machine except to place in the proper receptacle a package of bills just as they are found in the Bank. They are lifted out on a pneumatic principle one by one as accurately and as rapidly as the Cashier Machine works in the handling of coin alone. Moreover, it will be what might be termed the upper deck of the machine so that it will not materially increase

the size of the machine, but handle the paper over the coin tubes. In this way it will be so arranged that the operator can pay either coin or currency at will by means of a shift key engaging the currency or coin paying mechanism, as the case may be. Of course, the machine will be made to handle small change in coin, and it will operate to handle it and also the larger denominations in currency.

Dr. A. A. Millikan———#5.

The foregoing will answer fully the questions asked in your letter and we presume that nothing further need be said by us with reference to the company's affairs, as we feel absolute confidence in Messrs. Hopson and Hunter and know they would not make any representations to you that is not borne out by the facts and both of them having been in Portland so they have personally seen our factory, etc. They have complete data and knowledge as to the progress we have made. However, we should be very glad indeed to answer any further questions you see fit to make.

Yours faithfully,

UNITED STATES CASHIER COMPANY

Frank Menefee,
President."

FM:E

which said letter had theretofore and on June 7, 1912, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee, with the intent then

and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Fort Jones, California; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, had theretofore, as hereinbefore alleged, conspired, combined and agreed to devise and to execute;

4. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to-wit, the 30th day of January, 1913, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. Jos. Hunter, at Reno, Nevada, and

at the time of the mailing of said sealed envelope, afore-said, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

“January 30th, 1913.

Mr. Jos. Hunter,
Reno, Nevada.

Dear Sir:

We are trying to round out our stock selling as rapidly as possible. The fact is we have deals on at \$30.00 which will amply take care of the Company's treasury stock, and we have to handle, in order to keep the market clear, a quantity of stock for private parties and we are trying to take off the market all we possibly can. We can handle this situation very nicely if we can rush up our miscellaneous sales in some way.

I can not put this proposition up to very many and do not want to except in isolated places where it wont interfere with other sales and our stock selling generally. You are one of perhaps two or three that we have working for us, that we can put this confidential proposition up to, and we would not put it up to you except that you are going to a new location where I think there will not be much communication between the stockholders there and other places. If you do not want to work the proposition in this way, all you have to do is to say so and go at it in the same old way that you have been doing.

What I want to propose is that you could work like you did in northern California last summer at \$20.00 per share, only at that rate we would have to realize \$15.00 per share, which would only leave you with a commission of 25%. This advantage in the price would rush up the business so that you would make more money at that commission than at 30% insisting on selling at \$30.00 per share.

You understand if you work in this way that your subscriptions must be taken on the blanks that read Joseph Hunter, and your argument would be that the company stock was practically all placed and all provided for by contracts already made with a possibility of one or two failing and having to be sold to outside parties. With such a contingency no Company stock was to be had, but that you could sell a couple hundred shares or whatever amount you think proper to work on, and then sell it as long as you had sales, regardless of whether

#2 to Jos. Hunter, 1/30/13.

the amount runs out or not, and the stock you sell is either some of your previous sales at that price which your people have not been able to pay for, and which you can get by turning in the money quickly, or else that you got hold of a small block from a party that was hard up and had to realize some money, and in that way you were able to let them have the inside figure, unknown to the Company of course. As a matter of fact, this is a pri-

vate matter and must not be considered as Company business.

I do not need to say more to you, as you are so used to these situations, and will readily realize whether you had better work it this way or not, and if so on what plan you want to work. Whatever plan you do adopt if you go to working this way, write me fully personally, so I will know what to say if inquiries are made.

Yours faithfully,

Frank Menefee."

FM:HM"

Which said letter had theretofore and on January 30, 1913, at Portland, Oregon, been written and executed by the said defendant Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Reno, Nevada; and which said letter was then and thereof and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, had theretofore, as hereinbefore alleged, conspired, combined and agreed to devise and to execute;

5. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation, and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards and on, to-wit: the 27th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. L. H. Robinson, at Moorcroft, Wyoming, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, towit:

"Frank Menefee,	Robert J. Upton
Pres. and Gen. Mgr.	Secretary.
E. O. Gernert,	F. M. LeMonn,
Asst. Gen. Sales Mgr.	Gen. Sales Manager.

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing

Change-Making, Recording

Coin-Paying Machines

Automatic Cashier

Visible Listing

for Banks, Pay Rolls

and

etc.

Adding Machine

Automatic Change-

Computing Machine

for Department and

Retail Stores, etc.

Home Office, Lewis Building,

Portland, Oregon, 3/27/12.

Mr. L. H. Robinson,

Moorcroft, Wyo.

Dear sir:

We take pleasure in acknowledging due receipt through our Mr. B. F. Bonnewell of your subscription dated Mar. 4/12 for fifty shares of the Capital Stock of this Company at \$30.00 per share total \$1500.00, together with payment on same of \$100.00 cash, \$400.00 in thirty days and \$1,000.00 on or before six months from date.

Your certificate will be delivered when final payment has been received. Make all future pay-

ments payable to the United States Cashier Company or B. F. Bonnewell.

For some time we have been operating our factory at Kenton full blast, and will be able to deliver our first machines within a very short time. We will turn them out in increasing numbers each month after the first machines are completed, so that by the latter part of the year we should have a sufficient number of commercial machines on the market to place us upon a substantial paying basis and declare to the stockholders a reasonable dividend.

Thanking you for past and awaiting your future favors, we remain,

Yours very truly,

UNITED STATES CASHIER COMPANY

F. M. LeMonn

Sales-Manager."

FML-HES

which said letter had therefore and on March 27, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Moorcroft, Wyoming, and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants,

Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

6. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards, and on, to-wit, the 28th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. J. J. Bauer, at San Francisco, California, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary.
F. H. Gloyd,	F. M. LeMonn,
Treasurer.	Gen. Sales Manager.

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Computing Machine

for Department and

Retail Stores, etc.

Home Office, Lewis Building,

Portland, Oregon,

March 28, 1912.

Mr. J. J. Bauer,

San Francisco, Calif.

Dear Sir:

We have your favor of the 26th and have carefully noted contents. We are sorry that we inadvertently failed to reply to your communication of the 7th inst.

We cannot see anything peculiar in the fact that brokers are offering 200 shares, or any part of the same, of this Company's stock at \$13.50, when

you remember that the stock was selling at par \$10. per share, up until December 12, 1910, and at \$11 up until February 1st, \$12 $\frac{1}{2}$ up until July 1, 1912. Where there are more than 3000 stockholders who have subscribed for practically, in round numbers, 100,000 shares, it is not likely, but is absolutely true, that some of them will become financially embarrassed and will have to offer for sale or trade, some, if not all of their property. When a part of this property is U. S. Cashier stock it is not to be wondered at that it gets into the brokers' hands and in many cases they are forced to sell for less than they paid. However, the broker can make a profit when he sells at \$13.50 if the earlier subscriber of this stock sells to him for the same price he paid, \$10, \$11, or \$12.50.

For instance, consider this matter personally and ask yourself the question; if you were hard up for money and had to have it on other deals in order to save your property or your business, which may represent your principle interest, you would likely begin trading or selling, even at a sacrifice, some of your other property which was not as necessary for your comfort or livelihood. We would see nothing strange in the fact that stock was offered through brokers even if at \$5 per share, unless it represented dissatisfaction on the part of the stockholder, and this reason for letting go of stock has never been presented to our notice.

Mr. J. J. Bauer———#2.

The stock is selling freely at \$30 per share, and if the Company could legally, or believed it wise to speculate in stock, we would buy up this brokers stock and sell at an enormous profit, but our reason for offering stock to the public is simply and solely to enable us to get hold of the necessary funds to manufacture and place these machines on the market, and this Company has not deemed it wise to begin buying stock offered on the curb, no matter what the price may be. If you will talk with any curb broker you will find that he considers it a very healthy condition when he can get over par for stock in which he may be trading and he will only offer par and above because the Company's condition has been favorable enough to enable them to get a much higher price through their representatives who are eternally on the hunt for a prospective investor.

A stockholder's letter will be forwarded within a few days which will advise you that we have completed our Standard Commercial Bilyeu Automatic Cashier and that it has been working perfectly in every test devised for it. We are now manufacturing in commercial quantities and will be able to turn out machines from month to month in rapidly increasing numbers, until the fall of the year when we believe we can turn out several hundred machines per month.

The orders we now have on hand and are taking from daily demonstrations, will keep us busy for the next six to nine months to come, and we know we are entering a season of great prosperity. We believe the stockholders have reason to be congratulated upon becoming partners in this new industry.

Assuring you it will be our pleasure at all times to answer any and all questions concerning the Company and thanking you for past favors, we beg to remain,

Yours very truly,

UNITED STATES CASHIER COMPANY

F. M. LeMonn,
Sales-Manager."

FML:E

which said letter had theretofore and on March 28, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted, and delivered by and through the postoffice establishment of the United States to the said addressee at San Francisco, California; and which said letter was then and there on and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E.

Muraine and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

7. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in purusance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to-wit, the 19th day of August, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post-office and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. H. T. Johnson, at Grand Forks, N. D., and at the time of the mailing of said sealed envelope, aforesaid there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary.
F. H. Gloyd,	F. M. LeMonn,
Treasurer.	Gen. Sales Manager.

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Automatic Change-

Computing Machine

for Department and

Retail Stores, etc.

Home Office, Lewis Building,

Portland, Oregon,

August 19th, 1912.

Mr. H. T. Johnson,

Grand Forks, N. D.

Dear Sir:

Replying to your letter of August 10th, in which you enclose one of the same date addressed to you signed by Mr. Frank B. Feethan, will say:

As stated in the annual report, cases AO and B have resulted in letters patent being issued; in cases A, C and D, the patents are allowed, meaning that all of our claims have been allowed and that the

issuance of the patents is being held up because of our not having paid the final government fee and not having asked for their issuance.

We have not done this because we can renew our application by re-writing the claim each year, thereby lengthening the life of the patent and enabling us to write into our original application, many claims that will develop themselves as our standardizing and further development progresses.

In the other cases as indicated, the applications are filed, properly assigned to the Company by the inventors.

As to having had the records examined as to infringements, will say that our Attorney Mr. John F. Robb, has for some months past been devoting considerable of his time to the examination of the entire art of coin paying machines, particularly as adapted to the adding machine or combination, and his reports to us from time to time indicate that we will be fully protected and that all of our applications will be reasonably free from any chance of infringement whatever on any other known patent in the art.

The adding machine art is old and we can not claim any basic protection but our mechanism or machine, as we might say, is worked out entirely in a different method from any known adding machine, and will form the basis of a patent on the mechanical construction of the machine.

#2 To H. T. J. 8/19/12.

Were we going into the adding machine field alone, we would have to expect competition from all existing adding machine companies, although we believe we could successfully compete with them because of the simplicity of our machine, and the fact that it contains less parts and is more reliable, as well as performing certain offices and work that are not performed by the better known machines.

In the coin paying art, we are occupying a field practically new, in so far as any machine has been manufactured that would work in connection with the adding and listing device, and on this point and part of our machine, we are depending for our monopoly.

Our Attorneys have advised us, as I stated in my report, that we have the fullest protection with reference to this machine, the reference being to case "I," and as stated, the mechanism and principles of this machine will control all of the other machines we are placing on the market, and it will be found impracticable, if not impossible, to perform the work our machines will do, without going at it in a way so similar to our machines that it will be an infringement.

This mechanism is quite fully covered in case B, which has already gone to issue, and the new applications are intended more to cover the re-designing and certain minor improvements, than to

obtain the protection we need, as that is very fully covered by cases A, B and C, already issued or allowable.

We have had a special report from our Attorney with reference to the patent ability of our currency paying device, case M. We are advised that the principle we are applying with reference to the handling of currency, has never before been used in handling money, and that we can obtain protection therefor, and that there will be little or no likelihood of any previous patent or application.

The remark of Mr. Feethan that there is a great similarity between our machines and the Cash register is really not well founded in fact, inasmuch as the cash register has not attempted to do anything in the way of handling money. Its adding and listing devices are perhaps similar to ours, but those things are old and our use of them will not conflict with them in any manner, all the protection they have being their particular mechanism, and perhaps very little in that regard on account of the age of the patents.

The cash register, as I have stated, does not attempt to combine with their listing and accounting features any device

#3. To H. T. J. 8/19/12.

whatever for the computing of change or the paying of money or change by mechanical means, that

being done entirely by the individual or person operating the cash register.

With our machine, the patents cover the principles of having the machine automatically pay the money called for by the pressure of the keys, as well as add and list it. Also our computing machine application is directed to the handling of money, mechanically computing the difference between the two amounts, and automatically paying the amount of money representing this difference, as well as adding and listing the amount tendered and the amount of the purchase.

This application with the protection afforded in cases AO, B and C, and the new application on the re-designed and standardized form of the cashier machine, case I, cover all of the principles of our machines, so that any other machine will be merely the re-embodiment of these principles with certain improvements or changes so as to make them better adapted to slightly different purposes.

In regard to litigation, will say that we have never had any intimation of litigation of any kind with reference to any of our patents and have not had any one question the validity of any of our claims.

There is still approximately twenty thousand shares, par value of \$200,000, stock in the Treasury of the Company, a portion of which is represented by subscriptions that we are cancelling from time

to time on account of inability for some financial reason, of the subscribers to make their payments.

The stock that is now being sold is Treasury stock of the Company, and the entire amount for which the sale is made goes into the Treasury of the Company, less the selling agent's commission. No person receives any extra benefit or rake off out of the premium for which the stock is sold above par value.

Trusting that this will answer your questions, but assuring you that if you desire any further information, we will be more than pleased to write you further, we remain,

Yours faithfully,

Frank Menefee,
President."

FM:MM

Which said letter had theretofore, and on August 19, 1912, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee, with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Grand Forks, North Dakota; which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the

said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, has theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

8. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards and on, to-wit, the 29th day of February, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mrs. A. M. Armstrong, at 809 Wright & Callendar Bld'g., Los Angeles, California, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

"Feb. 29, 1912.

Mrs. A. M. Armstrong,
809 Wright & Callendar Bld'g.,
Los Angeles, Calif.

Dear Mrs. Armstrong:

Your night letter of yesterday received as follows:

'Englishman member of English Syndicate here for class A investments wants to buy right to manufacture machines England, Germany and France or England alone. If we have foreign protection can have sale completed forty eight hours by cable. Financial standing established in Los Angeles. Desires immediate reply. Other deals pending.'

We have replied to you as follows:

'Foreign rights of machines protected but will be necessary for personal interview with party in Portland. If sufficiently interested to come to Portland kindly advise by wire.'

We don't think there could be any good come from any correspondence of any party over such a serious matter when a ride of a day and one half would bring us together and matters could be taken care of in so much better way, as to warrant a personal interview; hence we feel that as we stated in our wire, these matters must be taken up at the home office personally, as we are not sufficiently in-

terested to attempt same by correspondence, inasmuch as it would, in all probability result in anything but a satisfactory manner.

Mrs. A. M. Armstrong——#2.

We want to thank you however for the interest you have taken in the matter and for calling our attention to same and if the party is serious in regard to this matter we will be only too pleased to talk the matter over, as the foreign rights are bound to bring some one much prosperity.

Thanking you for past and awaiting your further favors, we remain,

Yours very truly,

UNITED STATES CASHIER CO.

F. M. LeMonn,
Sales-Manager."

FML:E

Which said letter had theretofore and on February 29, 1912, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Los Angeles, California; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice

to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined and agreed to devise and to execute;

9. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation, and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to-wit, the 24th day of July, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit: the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. J. W. Brett, at 727 9th Avenue, Lewiston, Idaho, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary.
F. H. Gloyd,	F. M. LeMonn,
Treasurer.	Gen. Sales Manager.

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing

Change-Making, Recording

Coin-Paying Machines

Automatic Cashier

Visible Listing

for Banks, Pay Rolls

and

etc.

Adding Machine

Automatic Change-

Computing Machine

for Department and

Retail Stores, etc.

Home Office, Lewis Building,

Portland, Oregon,

July 24, 1912.

Mr. J. W. Brett,

727 9th Avenue,

Lewiston, Idaho.

Dear Sir:

Your letter of the 18th instant in regard to purchase of stock in our company at less than par is duly received. Your letter asks for the personal advice of the writer whether you should buy this stock or not, and you state that you have a little money, but have a family to support and are getting along in years.

You must realize that to advise you in a matter of this kind under these circumstances is a serious, and if I am at all conscientious, which I certainly am, I could not under any circumstances advise you where I thought there could be the least possible chance of your falling down on the investment.

The stock that is offered you is some stock that has been traded around no doubt and taken over by parties ready to do anything for the sake of realizing a little ready money. So far as we have found no stock we have sold for cash has ever gone on the market at less than the price paid for it, at least with the very rare exceptions where parties were absolutely compelled to have a little ready cash .

The question is also often asked, why, if we can buy this stock so cheaply and our price is \$30 per share, at which we are selling quantities of stock, do we not buy up the cheap broker stock. The answer to this is simply that the Company has no legal right to divert its funds in order to buy up and speculate in its own stock. One or two of the other directors and I have purchased some of the cheaper stock which we are holding, but of course our funds are necessarily limited and we can only buy what we can pay for in cash, and really, we have bought until we have used every dollar of ready cash we are able to let go of. I have paid many thousands of dollars since my connection with the company buying up stock in this way, and still

buying a little occasionally when I have the funds on hands with which to handle it.

Page 2.

Now, in answer to your question, will say that the time was a year or a year and a half ago when the future of the company was uncertain in that it was an open question still as to our ability to finance the company and also as to the quality of the product we could turn out for our stockholders. I had great confidence in our future at that time and even then advised my own family and friends to invest money in the proposition which they could not afford to lose.

At this time the company's affairs present an altogether different aspect. We have ourselves so thoroughly entrenched financially that beyond any question we can place our machines on the market commercially. I have investigated more thoroughly the patent situation and am thoroughly convinced that no complications in that line can arise whereby we will be seriously, if at all, handicapped in placing our machines on the market. We have proven to our complete satisfaction that we have a mechanical ability surrounding us than can handle any mechanical proposition we desire to put up to them. They have demonstrated their ability by the perfecting and standardizing of our Bank Cashier, for which we are now making final dies and which we expect to have on the market within the present

year at the outside; when I say on the market I mean in quantities sufficient to return a substantial revenue to the company each month in the way of profits.

In addition to this we have developed, so that we know we will make a commercial success of it, a Currency machine for our machines. We have developed the Computing Machine so that it is without question a success mechanically and it will be one of the best sellers we will put on the market far outrivaling the *the* sales of the Cashier Machine. We are also developing and will place on the market our Lightning Change Maker particularly equipped for streetcar service and also for sale of tickets at five and ten cent theaters, and also with a little changing can make it adaptable for use in small cigar stores, etc. This machine as we can and will put it on the market will be a ready seller and find a ready market all over the United States.

With our success as to our ability to place these machines on the market the future of the company can scarcely be estimated. It sounds almost like dreaming when we tell of the sales we know we can make and the profit that will arise from it, and I feel like I am conservative when I say to you that with all of our models on the market and the factory running at sufficient capacity to any where near supply the demand our stock should return not less than from 50% to 100% on the par value. This is very conservative.

We have our factory running employing now about fifty men and have it fully equipped with machinery, everything being paid for to the minute. In addition to this we have our old factory or development shop in which our first models were made,

Page 3.

still running on experimental and development work on the different types of machines we are expecting to put on the market.

In conclusion I will only say that the future of this company and its prospects I have outlined above are given to you absolutely in good faith with full conscientiousness of the seriousness of the advise you are calling upon me to give you, and I certainly consider if you get the opportunity to buy any of this stock at the price you mention, you are passing up a "snap" if you do not buy it to the full extent of your financial ability.

You have no doubt had our letters and literature from time to time, but if you have not received them, will be glad to mail them to you if you will advise us.

Yours faithfully,

UNITED STATES CASHIER COMPANY,

Frank Menefee,

President."

FM-HG

which said letter had theretofore and on July 24, 1912, been written and executed by the said defendant, Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Lewiston, Idaho; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

10. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to-wit, the 5th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully

prepaid thereon, a certain sealed envelope then and there addressed to Mr. John Marshall, at Harney, Oregon, and at the time of the mailing of said envelope, afore-said, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

"Frank Menefee Pres. and Gen. Mgr. F. H. Gloyd, Treasurer.	Robert J. Upton, Secretary. F. M. LeMonn, Gen. Sales Manager.
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UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing

Change-Making, Recording

Coin-Paying Machines

Automatic Cashier
 for Banks, Pay Rolls
 etc.

Visible Listing
 and.
 Adding Machines

Automatic Change-
 Computing Machine
 for Department and
 Retail Stores, etc.

Home Office, Lewis Building,

Portland, Oregon,

Mr. John Marshall,
 Harney, Oregon.

March 5, 1912.

Dear Mr. Marshall:

Your favor of some days ago was inadvertently mislaid hence we beg to apologize for not replying earlier to same.

We forwarded you, on or about Feb. 17th, our regular stockholders letter and for fear the same was mis-carried are enclosing another herewith, which will acquaint you with the progress we have been making to date, also that we expect the First Standard Commercial Automatic Cashier to leave the Factory within a few days. This machine has been assembled and doing its work in a most praiseworthy manner, but we want to continue to test it out for a week or ten days yet so that we will be sure that when it leaves the factory there can be no possibility of an error in any transaction it may be called on to make.

The resale stock is selling freely at \$30 per share and as these subscriptions represent those that we cancelled on account of the subscribers being in arrears with payments and make an immense profit over the first or early selling price and we have confidence that the last few hundred shares to be sold will not be offered at less than \$50 per share.

Now that our machines are practically ready for the market we have every reason to expect a season of great possibility as we have many orders now on our books and have orders coming in almost daily from the most unexpected sources, as well as many of them being entirely unsolicited by us and this rush of orders looks as though it will take us six months or more to catch up with the demand that we now know exists for these machines.

Hoping and believing that the progress will be so rapid from now on that it will please the most critical stockholder and awaiting your further favors, we remain,

Yours very truly,

Frank Menefee,
President."

FM:E

which said letter had theretofore and on March 5, 1912, been written and executed by the said defendant, Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post-office establishment of the United States to the said addressee at Harney, Oregon; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

11. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and

agreement, aforesaid, and to effect the object thereof, the said defendant herein, Frank Menefee, did afterwards and on, to-wit: the 5th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post-office and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. John Marshall, at Harney, Oregon, and at the time of the mailing of said envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary.
F. H. Gloyd,	F. M. LeMonn,
Treasurer.	Gen. Sales Manager.

UNITED STATES CASHIER CO.

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etc.

Visible Listing

and

Adding Machine

Automatic Change-

Computing Machine

for Department and

Retail Stores, etc.

Home Office, Lewis Building,

Portland, Oregon.

February 17, 1912.

TO STOCKHOLDERS:

We are pleased to advise, as you will note above, that on February 1st Mr. F. H. Gloyd became actively identified with this Company as Treasurer, and we have been the recipient of many compliments from bankers and business men of the Pacific Northwest commending Mr. Gloyd as a Banker and Business Man and congratulating this Company on securing his services in handling the financial department of this Company. He has been one of our stockholders for many months past and last year visited with us looking into the Management of the Company as well as our Manufacturing Department and this gave him such confidence in our future prospects that he accepted our proposition to become Treasurer and from now on will devote his entire time and attention to our business.

In order to take up his duties with us, Mr. Gloyd tendered his resignation as President and Manager of a chain of four banks, viz: The State Bank of Prosser, Union Bank, of Granger, Grand View State Bank of Grandview and the Kiona State Bank of Kiona, all in the Yakima Valley, Washington. However, at the present time he is yet the nominal President of the last three named banks as he is being retained as the President only until such time as the directors can elect new Presidents.

Previous to his fifteen years' banking experience, he was the first auditor of Benton County, Wash., and for a number of years auditor of Pierce County, Wash., of which Tacoma is the metropolitan city.

You will readily appreciate that no business man holding such responsible positions as Mr. Gloyd held would leave same to go with any corporation if he had any doubt as to his new connection being other than that which offered most substantial promotion, not only for the present, but for all future time; hence we may be excused for taking some pride in making this announcement.

We also desire to announce most substantial additions to our Mechanical Staff. Since the first of the year we have secured a dozen mechanical experts direct from the Burroughs Adding Machine Co's plant in Detroit, which means that we now have fifteen men of the highest class designers, developers, and mechanics from that great manufacturing company. We also have many high class mechanics who have been for years with the National Cash Register Co. of Dayton, and other equally as well known specialty manufacturing plants.

#2.

There can be no question but with the addition of many thousands of dollars worth of new machinery which has been installed since January 1st, that today this Company is in a position to manu-

facture most successfully and turn out as good a product as any of these eastern plants which have been established for many years. Our factory payroll now amounts to between \$4000 and \$5000 per month, all of which is being expended along the line of manufacturing our first lot of Bilyeu Automatic Cashiers and Adding Machines.

Our business has already begun to expand to such an extent that we needed the room occupied by our Woodworking Department in order to give additional space for heavy machinery on the first floor; hence we have just completed a separate building into which we have transferred our Woodworking Department and are now ready to let the contract for the new addition to accommodate the Forge or Hardening Department.

The first commercial Automatic Cashier, as previously advised, will be finished and ready to leave the factory by the latter part of this month, which means that we are now practically ready to market our machines. Our salesmen are beginning training to take up the sale of these machines, as the stock selling campaign is practically at an end and the only stock that we are offering is that which has been released by cancelled subscriptions which were made many months ago and not settled for according to contract. As the stock is now selling freely at \$30 per share, you may readily understand that the Company is making a handsome profit on these resales.

After paying every obligation of the Company, including factory and equipment and all development expenses up to the time when our machines are ready for the market, we will still be able to provide a Manufacturing Fund of not less than \$200,000. This will be ample to continue the manufacture of the machines and place them on the market until such time as the proceeds from the sale of the machines will be returning a substantial profit to the Company.

We feel if you have carefully read the above you will agree with us and the experts who have visited our factory, that we have made most substantial progress considering the quality of workmanship and improvements we have made on our Automatic Cashier. It is no exaggeration to state that we have advanced the manufacture of these first commercial machines more rapidly and successfully than has heretofore been either accomplished or attempted by any of the well established manufacturing plants when they have placed a new device on the market.

Hoping that we have your hearty support in the future as we have had in the past, we beg to remain,

Very truly yours,

UNITED STATES CASHIER COMPANY,

Frank Menefee,

President."

which said letter had theretofore, and on February 17, 1912, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Harney, Oregon; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

12. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards, and on, to-wit, the 8th day of April, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland,

Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. L. H. Robinson, at Moorcroft, Wyoming, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to-wit:

“Portland, Oregon, April 8, 1912.

TO STOCKHOLDERS:

At last we are able to announce that our Standard Commercial “Bilyeu” Automatic Cashier has been completed and is working perfectly in every test suggested or devised for it. This feat of redesigning and standardizing the machine has been accomplished in much less time than has ever been done by any of the old established manufacturing companies. The demonstrating model of our Automatic Cashier (which is the only one we have shown to the stockholders when soliciting their financial support) has a keyboard of four rows or banks and its capacity for paying and listing is from one cent to \$99.99. In addition to the above the only work this model performed was that of making change for \$1, \$5, \$10 and \$20.

Comparing this demonstrating model with the Standard Commercial Machine, which is now finished, you will be able to at least partially understand what a tremendous and difficult task has been before us. The work the redesigned machine performs is as follows:

1st—Pays any amount from one cent to \$200.00.

2nd—Prints an instantaneous, visible and permanent record on the recording tape of any amount paid out or listed from one cent to \$9999.99.

3rd—Gives a visible total of each amount as paid, and also prints on the recording tape sub-totals and grand totals at will.

4th—Prints the amount paid on the face of the check by means of a duplicate printing device.

5th—Makes change for \$1, \$5, \$10 and \$20 by using one key only; the change given for each being the most serviceable—even down to a nickel for streetcar fare.

6th—Has nine denominational keys, permitting the operator to pay any number of any coin at will, or to make change in this way for any arbitrary amount desired without disturbing the keyboard or previous totals.

7th—Has removable coin-receptacles permitting storing of same in vault without unloading the coin; also permitting more than one cashier to use the machine by having his own change or funds in separate coin-receptacles.

8th—Signal bell rings when any coin tube is becoming depleted (but not empty) thus enabling the operator to replenish same before a false transaction can be made.

9th—The Cashier may be used as a visible adding and listing machine, without reference as to paying money, by depressing a shift key which disengages the paying mechanism, allowing adding and listing without removing the coin-receptacles.

If the operator has paid out \$5750.10 and then desires to add or list a number of checks, without paying any money, all that is necessary is to depress the total key, which would print a permanent record on the tape of the amount paid out and also clear the totaler. He would then depress the non-pay key and add or list as many transactions as he desired and total the same. To again make payments he would simply depress the keys representing the amount originally paid out (\$5750.10) as shown by the printed total and pull the lever which would re-read this amount into the totaler, without ejecting the same, and then release the non-pay key and the machine is again ready to pay, just as before adding or listing the checks.

This machine has a flexible keyboard permitting the correction of an error in any one row or bank of keys without resorting to the use of an error key, and is also equipped with a repeat key to be used when the operator desires to make duplicate transactions in paying, listing or adding. We can manufacture larger models which will pay up to \$1000 if any Bank or Pay Master desires same, although the hundreds of demonstrations we have made to the leading bankers and Pay Masters has

convinced us that there will be very few, if any, required to pay more than \$200.00 in coin, as they state that 95% of all the checks cashed are less than \$100 each.

Having finished the redesigning and standardizing, all our work is now devoted to manufacturing this Cashier and, as we have a great number of parts ready for assembling, we are now practically ready for the market in the way of taking orders and making deliveries. We have more orders on hand than we will be able to fill in the next six months, and orders are coming in continually at a rapid rate.

Our stock selling campaign is practically at a close, but in order to retain our splendid selling force until the machines are ready for the market, we are using them in the resale of stock previously subscribed but not settled for. This resale stock, subscribed for at a much lower figure than at the present price of \$30 per share, gives a handsome profit to the Company. Our financing, as you know has been most successful and the substantial subscriptions will furnish us ample funds for the manufacture and sale of the machines until the proceeds from same will take care of all future needs. Many of the heavy stockholders who have visited the factory from time to time are unanimous in their praise of the Management for being able to construct a machine with such wonderful utility and perfect mechanism in such a short length of

time, although we know this work of redesigning and standardizing has severely taxed the patience of many of our shareholders who have not had the privilege of visiting the factory and seeing the progress made.

We are enclosing herewith a page of this month's issue of the "Pacific Banker" and you will find thereon the impression which our factory and machines have made upon Mr. Lydell Baker, the editor of this, the only exclusive banking and financial paper of the Pacific-Northwest. A careful reading of what this keen business man thinks of this Company and its product after having made most thorough investigation and tests is convincing that this Company is not only destined to make History for Portland, but has entered upon an epoch of great earnings for the shareholders who have been fortunate enough to secure stock in this enterprise.

We have been favored with a visit to our general offices and factory by a great number of both Portland and out-of-town shareholders, and as many of you are either manufacturers or have visited other manufacturing plants, we earnestly request each and every one of you to make mental note of the things you see and write us on any subject or thing you observe that you believe could in any way be for the betterment of our Company and product.

Yours very truly,

UNITED STATES CASHIER COMPANY,

By F. M. LeMonn, Sales Mgr.

which said letter had theretofore and on April 8, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Moorcroft, Wyoming; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

13. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful, conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards and on, to-wit, the 7th day of April, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a postoffice and postal station of the United States postoffice establishment, to-wit, the United States postoffice at Portland,

Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. B. F. Bonnewell, at Northern Hotel, Billings, Montana, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope, a certain letter which said letter was and is as follows, to-wit:

“April 7, 1912.

Mr. B. F. Bonnewell,
Northern Hotel,
Billings, Mont.

My Dear Bonnewell:

We are sending you herewith a letter which we are mailing to all stockholders today and would ask you to read the same carefully so that you will know just what we are saying to them and also be able to present the Company's affairs in such a manner that no one can doubt our sincerity regarding the progress we are making.

We are especially pleased to call your attention to the last page of this month's issue of the “Pacific Banker” as you will find thereon a writeup on our wonderful machines and the factory by Mr. Lydell Baker, the managing editor, to whom the writer had the pleasure and privilege of showing the machines and factory for the best part of two days last week.

This writeup should be invaluable to you as a canvassing document. If you read it carefully and

inform your prospective investor that the "Pacific Banker" is a weekly periodical, going to all the bankers of the Pacific Northwest, inasmuch as it is the only banking paper published on the Coast and the editor, Mr. Lydell Baker, is a keen business man who of course keeps in touch with the financial interests and doings of the entire Pacific Coast, we believe the editor's philosophizing of the fame that will naturally come to Portland because of its being the home of the U. S. Cashier Company is not overdue and is entirely within both the possibility and probability of the very near future.

This is in no sense an advertisement as no editor is going to go on record in this manner and jeopardise his position in the business world for an insignificant sum which would be required to pay for the space devoted to this article. We could have taken the editor out to our factory many months ago and have had this writeup of our industry appear in this valued periodical but we preferred to wait until such a time as a careful investigation by this keen business man could

Mr. B. F. Bonnewell———#2.

be nothing else but a great boost to this Company, both financially and from a manufacturing point of view, as could only be evidenced by a visit to our factory and careful examination of its equipment, and to see this redesigned Standard Commercial Automatic Cashier in actual work. Mr. Baker had

this machine demonstrated for him most thoroughly as we put it to every test that he could possibly think of and in each and every particular it worked perfectly—in every instance paying out the proper amount of coin, giving an instantaneous visible and *perment* record, printing the amount on face of check, adding same to the previous total, printing sub-totals and totals at will repeating the same transaction as often as desired by depressing the repeat key and then by the use of the shift key or non-pay key, adding and listing and sub-totaling the same at will, without reference to the paying out of money.

This writeup surely cannot help but enable you to close some business the very day that you receive it and I mean by that, some business you were unable to close and perhaps felt was lost or lost until some future time. If you will but take this “Pacific Banker” with you again call upon some of these prospects and give as a reason, that you want him to see this splendid writeup by a disinterested party and the only banking paper of the Pacific Northwest, so that your prospective investor will have that verification from an expert unselfish source it should convince him that he is making a mistake to delay this matter a single day.

It is positive fact that if you are to participate in the prosperity that should come to each of our representatives in this closing campaign of \$30 stock, you should use your head to the best ad-

vantage as well as put forth the greatest possible amount of energy and effort, as the advance to \$50 may take place almost any day and without any previous notice.

Hoping our efforts here at the office, in the way of this writeup will prove not only a boom to us with the banking fraternity who will use our machines but will also be of great value to you in closing business, we beg to remain,

Yours very truly,

UNITED STATES CASHIER COMPANY,

F. M. LeMonn,

Sales-Mgr."

FML:E

which said letter had theretofore and on April 7, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Billings, Montana; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

14. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of said unlawful conspiracy, combination, confederation and agreement, aforesaid, to effect the object thereof, the defendant, F. M. LeMonn, afterwards and on, to-wit, the 27th day of August, 1912, having theretofore received from the defendant, B. F. Bonnewell, a telegram of which the following is a true and correct copy:

“NIGHT LETTER
THE WESTERN UNION TELEGRAPH
COMPANY

Aug 1912

Gillette Wyo 26

U. S. Cashier Co

708 Lewis Bldg

Portland, Ore

Can you furnish us with two hundred more shares to sell answer by wire kindly phone my wife to write me to Sheridan care Great Western Hotel as I leave here Thursday

B F Bonnewell.”

did at Portland, and within the State and District of Oregon, execute and cause to be transmitted, sent and telegraphed over and by means of the wires of the Western Union Telegraph Company, a certain telegram to the said B. F. Bonnewell, of which the following is a full, true and correct copy, to-wit:

**"THE WESTERN UNION TELEGRAPH
COMPANY**

August 27, 1912

B. F. Bonnewell
Gillette, Wyo.

Received wire. Allotting you two hundred more shares for cash.

United States Cashier Co.

FML:E
CHG"

with the intent then and there in the said defendant, F. M. LeMonn, that the said telegram should be sent, transmitted and delivered to the said defendant, B. F. Bonnewell, by the said the Western Union Telegraph Company; said telegram was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined, confederated and agreed to devise and to execute;

15. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of said unlawful conspiracy, combination, confederation and agreement,

aforesaid, to effect the object thereof, the defendant, Frank Menefee, afterwards and on, to-wit, the 19th day of May, 1912, having theretofore received from the defendant, B. F. Bonnewell, a telegram, of which the following is a true and correct copy:

“DAY LETTER
THE WESTERN UNION TELEGRAPH
COMPANY

Deer Lodge, Mont. May 19th, 1912.

Frank Menefee,
708 Lewis Bldg.,
Portland, Ore.

Wire Paul Dungan Big Timber, Montana, Wm. Bonnewell, Sheridan, Wyoming and myself here all care Hotel closing telegram and about stock advancing send them night letters tonight if you can.

B. F. Bonnewell.”

1105 AM

did at Portland, and within the State and District of Oregon, execute and cause to be transmitted, sent and telegraphed over and by means of the wires of the Western Union Telegraph Company, a certain telegram to the said B. F. Bonnewell, of which the following is a full, true and correct copy, to-wit:

"NIGHT LETTER
THE WESTERN UNION TELEGRAPH
COMPANY

May 19, 1912

To B. F. Bonnewell,
Deer Lodge, Montana.

Stock allotted practically exhausts amount at thirty and deals pending when closed will more than cover Close all business and report as you go. May have to raise price to fifty at any time. Directors meeting Tuesday night.

United States Cashier Co."

Chg.

with the intent then and there in the said defendant, Frank Menefee, that the said telegram should be sent, transmitted and delivered to the said defendant, B. F. Bonnewell, by the said The Western Union Telegraph Company; said telegram was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined, confederated and agreed to devise and to execute;

16. And the Grand Jurors aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant, Frank Menefee, afterwards, and on, to-wit, the 5th day of June, 1912, did, at Portland, Oregon, execute and cause to be transmitted sent and telegraphed over and by means of the wires of the Western Union Telegraph Company, a certain telegram to Mr. Edward E. Amsden, at Bender Hotel, Houston, Texas, of which the following is a full, true and correct copy, to-wit:

“DAY LETTER
THE WESTERN UNION TELEGRAPH
COMPANY.

Portland, Ore. June 5, 1912.

Edward E. Amsden,
Bender Hotel,
Houston, Texas.

Patents and applications filed fully protect Cashier Adding Machine computing machine little change maker and currency paying machine. After extensive search our attorneys assure us amply protected in monopoly of devices. No suits whatever pending against Company. Assets Bills and accounts receivable and cash on hand for stock sold two hundred ninety five thousand. Real estate including factory site and building one hundred twenty seven thousand. Machinery tools equipment and development commercial machines one hundred twenty thousand. Paid for patents stock

and cash approximately four hundred thousand. Liabilities unpaid on patent contracts not yet due twenty five thousand. Bills Payable and endorsement on paper sold seventeen thousand. Total assets Nine Hundred forty two thousand. Total Liabilities forty-two thousand.

Frank Menefee."

Charge

U. S. C. Co.

FM-HG

With the intent then and there in the said defendant, Frank Menefee, that the said telegram should be sent, transmitted and delivered to the said Edward E. Amsden, by the said the Western Union Telegraph Company; said telegram was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, E. O. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell had theretofore as hereinabove alleged, conspired, combined, confederated and agreed to devise and to execute;

Contrary to the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 27th day of February, 1915.

A TRUE BILL.

John Driscoll.

Foreman of the United States Grand Jury.

Clarence L. Reames,
United States Attorney.

The following witnesses were examined under oath
before the Grand Jury:

W. S. Overlin, F. A. Bullington, Fred V.
Conley, Nelson White, J. F. Plover, N. C. Oviatt,
C. J. W. Hayes, Myrtle Meadows, George W.
Moyer, Harry Wainright, John Marshall, C. F. L.
Smith, A. A. Milliken, J. W. Zufall, Harry Car-
ruthers, R. O. Holmes, John Straub, T. W. Harris,
L. H. Robinson, C. K. Clarke, E. W. Draper,
Jonas Hansen, W. B. Morse, E. D. Paine, R. L.
Anderson, E. A. Mulkey, C. A. McMahon, R. L.
Robison, E. O. Tobey, S. M. Sim, J. W. Brett,
J. S. Swenson, H. S. House, W. R. Litzenberg;

The following named witnesses appeared at their
own request and testified under oath before the Grand
Jury:

S. M. Mears, F. H. Gloyd, J. F. Robb, Frank
Menefee (one of the defendants herein) and
Thomas Bilyeu (one of the defendants herein).

Endorsed: A True Bill, John Driscoll, Foreman
Grand Jury.

Filed February 27, 1915.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 10th day of May, 1915, the same being the 62nd judicial day of the regular March, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF ARRAIGNMENT AND PLEA OF O. E. GERNERT.

Now, at this day, come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendants O. E. Gernert and F. M. LeMonn, each in his own proper person and by Mr. C. C. Dalton, of counsel; whereupon said defendants O. E. Gernert and F. M. LeMonn being duly arraigned upon the indictment herein, for plea thereto, each for himself says he is not guilty.

And afterwards, to-wit, on Saturday, the 21st day of August, 1915, the same being the 42nd judicial day of the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL AND RECORD OF VERDICT.

Now, at this day, come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. John J. Beckman, Assistant United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, Thomas

Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell appearing each in his own proper person and by his counsel as of yesterday; whereupon the jury empaneled herein come into court and return to the court their verdict in words and figures as follows, to-wit, "We, the jury in the above entitled action, find the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell guilty as charged in the indictment, and the defendant Thomas Bilyeu not guilty. We, the jury, also recommend the defendant, Oscar A. Campbell, to the mercy of the court. Wm. Fleming. Foreman." which verdict is received by the court and ordered to be filed; whereupon on motion of said plaintiff it is ordered that each of said defendants except the defendant F. M. LeMonn be allowed to go upon the bail heretofore given by them respectively, but that the bail of the defendant F. M. LeMonn be and the same is hereby increased to the sum of \$5000.00 and that in default of said bail he stand committed to the county jail of Multnomah County, Oregon, and on motion of said defendants, it is ordered that they be and each of them is hereby allowed ten days from this date within which to file a motion for new trial herein. And afterwards, to-wit, on the 21st day of August, 1915, there was duly filed in said Court a Verdict, in words and figures as follows, to-wit:

VERDICT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E.
Gernert, B. F. Bonnewell, H. M. Todd, Joseph
Hunter, O. L. Hopson, P. E. Muraine, and Oscar
A. Campbell,

Defendants.

We, the jury in the above entitled action, find the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell guilty as charged in the indictment, and the defendant Thomas Bilyeu not guilty.

We, the jury, also recommend the defendant, Oscar A. Campbell, to the mercy of the Court.

Wm. Fleming, Foreman.

Filed, August 21, 1915.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 25th day of October, 1915, the same being the 97th judicial day of the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding; the following proceedings were had in said cause, to-wit:

RECORD OF SENTENCE OF O. E. GERNERT, THAT ORDER ADMITTING TO BAIL. AND ORDER ALLOWING TIME TO SUBMIT BILL OF EXCEPTIONS, AND STAYING EXECUTION.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and O. A. Campbell, each appearing in his own proper person and by Mr. Martin L. Pipes, Mr. A. P. Dobson, Mr. John F. Logan, Mr. Robert F. Maguire, and Mr. Larkin Bilyeu, of counsel; whereupon said plaintiff moves the court for judgment upon the verdict of the jury heretofore filed herein; whereupon the court having heard the statements made on behalf of said defendants:

It is considered that said defendant Frank Menefee and the said defendant F. M. LeMonn each be imprisoned in the United States penitentiary at McNeils Island, Washington, for the term of one year and ten days, and that said defendants O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell each be imprisoned in the county jail of Multnomah County, Oregon, for the term of four months and that each of said defendants stand committed until this sentence be performed or until they be discharged according to law. Whereupon on motion of said defendants it is ORDERED that they be and they are hereby allowed until December 1, 1915, within which to submit a bill of exceptions herein, and on motion of said plaintiff it is

ORDERED that the bail of the said defendants Frank Menefee and F. M. LeMonn be and the same is hereby fixed at the sum of \$5000.00 and that the bail of the said defendants O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell be and the same is hereby fixed at the sum of \$2500.00; and it is further ORDERED that execution of the sentence be stayed as to said defendants upon the filing of bonds in the amounts herein fixed, until December 1, 1915.

And it appearing to the court that the said F. M. LeMonn does not desire to give further bail, it is ORDERED that commitment forthwith issue in accordance with the judgment of this court as to the said defendant.

And afterwards, to -wit, on the 29th day of March, 1916, there was duly filed in said Court, and cause, a Bill of Exceptions, in words and figures as follows, to-wit:

BILL OF EXCEPTIONS.

Be it remembered that on the 7th day of July, 1915, at a stated term of said court beginning and held in Portland, Oregon, before R. S. Bean, District Judge, presiding, the above entitled cause came on to be heard before said court and a jury impanelled therein (the defendants P. E. Muraine and O. L. Hopson not being on trail); the United States appearing by Clarence L. Reames, United States Attorney for the District of Oregon, and John J. Beckman, Assistant United States Attorney for said district, and the defendants Menefee, LeMonn, Bilyeu, Bonnewell, Todd and Campbell being

present in person and represented by counsel, and the defendant O. E. Gernert being present and represented by his counsel Robert F. Maguire:

Whereupon the following proceedings were had, to-wit:

(Note. Hereafter for the purpose of brevity in this statement of the evidence, wherever the term "the defendants" is used in this statement of the evidence, it means and includes the defendants Frank Menefee, F. M. LeMonn, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell—the term does not include either the defendant O. E. Gernert or the defendant Thomas Bilyeu.)

It was stipulated by the United States Attorney and by the attorneys for "the defendants," and particularly by the attorney for the defendant O. E. Gernert that in order to expedite the trial that the record should show that an objection in due and proper form was duly and timely made, overruled by the court, and an exception allowed to each defendant, to each and every question, answer, and matter of testimony and evidence offered by the United States that was no proof of an act done, words written by, or conversation talked with, spoken by, or in the presence of, each particular defendant; the court stating that the United States must subsequently connect the testimony with the defendant Gernert.

The plaintiff, to sustain the issues on its part, offered evidence, which was received, tending to support the

allegations of the indictment, and to prove that the United States Cashier Company, at all the times specified in the indictment, was a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the city of Portland, county of Multnomah, and within the state and district of Oregon; that at all times between the first of September, 1910, and the 31st day of January, 1914, the defendant Frank Menefee was the duly elected, qualified and acting director of said corporation, and that at and during all the times between the 1st day of September, 1910, and the 31st day of January, 1914, the said Frank Menefee was the duly elected, qualified and acting president of said corporation, and that at and during all of the times between the 28th day of September, 1910, and the 31st day of January, 1914, the said Frank Menefee was the duly elected, qualified and acting General Manager of said corporation; that at all the times and dates between the 1st day of September, 1910, and the 1st day of November, 1912, the defendant F. M. LeMonn was the duly elected, qualified and acting Sales Manager of said corporation; that at all the times between the 1st day of January, 1911, and the 1st day of January, 1912, the defendant Gernert was an agent and salesman of said corporation, and the duly appointed, qualified, and acting Assistant Manager of said corporation; that there was no evidence offered that the defendant Gernert tendered his resignation to his position, but the books of the company show that he was not credited with any salary or expense money as such Assistant

Sales Manager after the 31st day of December, 1911; and the witness Gloyd testified that Gernert was not Assistant Sales Manager after that date; and the defendant Menefee testified that he didn't work for the company after the 1st day of January, 1912, and there was no other evidence offered that he was Assistant Sales Manager after that date, other than a letter written May 16, 1912, being Government Exhibit "E66," as follows:

GOVERNMENT EXHIBIT "66."

May 16, 1912.

Mr. O. E. Gernert,
432 Pioneer Bdg.,
Seattle, Wash.

My Dear Gernert:

I am herewith enclosing you blueprint showing our factory property and buildings which may be of some assistance to you in the way of evidence of what you are telling with reference to the buildings and property, especially as to its size, etc. You will notice the property outlined as belonging to the Company, and also the size and location of the buildings. This print is according to scale, so it will be very easy for you to determine what buildings we have located on our property.

In this connection I am wondering if you have really in your mind and in your work, keeping strictly up-to-date with reference to the progress we have made. I am not beginning this letter as trying

to give you "hot air," but a simple statement of the facts as to our present condition, aiming to more thoroughly imbue you with the idea that the proposition is right, and that if properly presented cannot but impress the customer you are trying to interest him in the purchase of stock. You want to remember that you are now offering stock for sale in a fully tried out proven and demonstrated proposition. Our commercial machine is completed and tried and found to be perfect in every respect and in a week's demonstration of it here in the city has met with the approval and endorsement of every banker and business man who has examined it. This leaves the machine no longer a question of promises, but a demonstrated fact.

The enclosed blueprint shows you the property we own as a factory site and the buildings thereon, this having been an existing fact for some months past. Our buildings are stocked with all of the machinery necessary to manufacture the machines in commercial quantities, and it is estimated by our factory superintendent that less than \$5000 per month will take care of our plant and the making of dies to our full capacity until such time as we have our machines delivered to the market in commercial quantities so as to bring money back into the treasury. This with the resources and assets you know we have on hand makes our success financially a demonstrated fact for our ground, our buildings and our machinery are paid for and

title is in the Company and nothing exists against it in the way of liens and incumbrances whatsoever.

As you know, when we first began the financing of our Company we began with the aim and expectation of redeeming the stock which had been issued and placed in escrow in payment for patents, inasmuch as we could do this thereby saving a large amount of stock to the Company which we could sell and use for other purposes. The amount necessary to redeem this stock was \$200,000 and up to this time, besides having built our factory, stocked it with machinery and paying expenses of developing our commercial machine, including practically three-fourths of the expenses of making our dies, our die making being at that stage at this time we have reduced the amount necessary for the final redemption of the patent stock to \$30,000; this without having negotiated any loans and having wiped out our other indebtedness in the meantime.

Within the next few days we will have out more of our commercial machines, the parts being all completed for several of them and they being now in the assembling room, and being put together by our mechanics. A little time now will be needed in completing the making of our dies and then our factory is sufficient to turn out machines at the rate of several hundred per month; of course the output increasing from this time on until we have reached

the minimum output we can handle in our present factory.

I want to impress on you that our progress and the way we stand to day actually exist and are apparent to every person who comes to our city and looks us over. The time was when we were almost fearful of having people brought to Portland to investigate us because we had not demonstrated our ability to make good and people of the city might say things, unexplained would work against us rather than for us, but today and for some time past we have not hesitated to have the brightest business men brought here to look at our plant and learn in the fullest detail what we have accomplished and what we have before us. We have been looked over by bankers and the shrewdest business men from such places as Chicago and other eastern points as well as from Montana, Wyoming, California, and other places, and our stockholders are also given a standing and urgent invitation to see our plant and I can say, without a single exception that those who have taken the trouble to come and visit our offices and factory, all have gone away not only entirely satisfied, but enthusiastic.

These facts I want you to remember actually exist and believing them yourself you can impress your customer with this belief.

The question will naturally arise in your mind and perhaps in the mind of your customer why, if

we are in this condition financially and our factory has made this progress, we are still selling stock. The answer is this; We began the making of this progress along with our financing and have kept our financing ahead of our expenditures so we have carried through everything we have undertaken to do, and while the Company's stock is all sold and we could not, under the order of Board of Directors, increase our stock liability at all, not even a single share, we began the reselling campaign with some \$250,000 of unpaid subscriptions out of which you must realize there will be a number of thousands of dollars which we are unable to collect from the subscribers on account of financial conditions alone. In other words many who should not make such an investment because they are unable to pay; others who have prospects of being able to pay when they give the subscription and sign *and sign* the note meet with financial reverses in their business affairs so that it is very convenient, if not impossible to meet their obligation. We have our finances in such condition that we do not need to enforce payments in cases of this kind but find it preferable and profitable to cancel all such subscriptions and resell again at a much higher figure, realizing thereby a much greater sum for this Company's treasury than if we should enforce collection.

We are not having to cancel where people are able to pay. They are all paying their notes will-

ingly. They being the situation you can realize that we only have a little more stock to sell and the amount that can be sold by any agent depends on how quickly he sells so as to get in ahead of other salesman as we are not allotting it, but allowing each one to make as many sales as he can until such time as we are compelled to stop.

Mr. LeMonn is out of town for a couple of weeks, which accounts for my writing you in person. As you are aware I was also out of the city for some five weeks only getting here a little over a week before Mr. LeMonn left, therefore I may not be fully informed as to your prospects and the conditions surrounding you and I would take it as a special favor to have a letter from you advising me fully *fully* along these lines, and I assure you anything we can do from this office will be promptly attended to.

Trusting that you will be able to do a little more than your share of the business yet to be done and with best personal regards of the writer,

I am,

Yours faithfully,

.....

President.

FM:E.

That at and during all of the times and dates between the 15th day of April, 1911, and the 31st day of January, 1914, the defendant B. F. Bonnewell was the duly

elected, qualified and acting Fiscal Agent for the said corporation, and an agent and salesman for said corporation, engaged in selling the stock thereof; that at and during all of the times and dates between the 15th day of April, 1911, and the 1st day of September, 1913, the defendant H. M. Todd was a duly appointed, qualified and acting Sales Agent for said corporation, engaged in selling the stock of the said corporation; that at and during all the times and dates between the 26th day of May, 1911, and the 31st day of January, 1914, the defendant Joseph Hunter was the duly appointed, qualified and acting Sales Agent for said corporation, engaged in selling the stock thereof; that at and during all the times and dates between the 23rd day of November, 1910, and the 1st day of July, 1913, the defendant O. L. Hopson was the duly appointed, qualified and acting Sales Agent of said corporation, engaged in selling the stock thereof; that at and during all the times and dates between the 6th day of March, 1911, and the 31st day of January, 1914, the defendant P. E. Muraine was the duly appointed, qualified and acting Sales Agent for said corporation; that at and during all of the times and dates between the 12th day of June, 1911, and the 31st day of January, 1914, the defendant Oscar A. Campbell was the duly elected, qualified, and acting director of said corporation, and that at and during all of the times between the 30th day of January, 1912, and the 31st day of January, 1914, the defendant Oscar A. Campbell was the duly elected, qualified and acting Vice-President of said corporation; that at and during all of the times and dates between the 9th day of June,

1913, and the 31st day of January, 1914, the defendant Thomas Bilyeu was the duly elected, qualified and acting Director of said corporation.

That at and during all of the times and dates between the 1st day of September, 1910, and the 31st day of January, 1914, the capital stock of the said corporation amounted to the sum of \$1,200,000.00, divided and segregated by the articles of incorporation of said corporation into 120,000 shares of the par value, as fixed and stated in said articles of incorporation, of \$10.00 for each and every of said shares.

And the plaintiff, to sustain the issues on its part, offered evidence which was received, which evidence tended to prove that at the city of Portland, within Multnomah County, Oregon, and on or about September 1, 1910, "the defendants" did then and there unlawfully, wilfully and feloniously conspire, confederate and agree together to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud, to-wit, section two hundred fifteen of the criminal code of the United States; that is to say, "the defendants" did then and there unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, and with divers other persons, to devise and execute a scheme and artifice to defraud to be effected by means of the postoffice establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises from the fifty-five persons named in the indictment, and therein termed as

INVESTORS, and from divers other persons, and the public generally, by inducing, inciting and procuring the said INVESTORS and divers other persons and the public generally, to open communication with "the defendants" and with the said United States Cashier Company, a corporation, and by inducing, inciting and procuring the said INVESTORS and divers other persons, and the public generally, to purchase from "the defendants" and from said corporation, namely, United States Cashier Company, the shares of stock of said corporation and to pay over, deliver and to transfer to "the defendants" and to the said corporation, namely, United States Cashier Company, in exchange and payment for said shares of stock the money and property of the said INVESTORS and of divers other persons, the payment of said sums of money to "the defendants" and to the said corporation, namely, United States Cashier Company, and the transfer of said property to "the defendants" and to the said corporation; to be induced, incited and procured by the false and fraudulent representations of "the defendants" to be made to the said INVESTORS and to divers other persons by "the defendants."

That it was a part and parcel of said unlawful, wilful and felonious conspiracy, so entered into by "the defendants," that said scheme and artifice to defraud the said INVESTORS and divers other persons, and the public generally, should be by "the defendants" carried out, carried on and effected by the further means, methods, manner and plans, that is to say, "the defendants"

would cause, induce, incite and procure the said INVESTORS and many and divers other persons, and the public generally, to pay over and to deliver to and to transfer to "the defendants," and to the said corporation in payment of and in exchange for the shares of stock of said corporation, United States Cashier Company, money and property of the value of more than the sum of one million dollars, which said payment of said money and which transfer of said property was to be by "the defendants" induced, incited, procured and obtained by the dishonest, fraudulent and false representations and promises hereinafter set forth, all to be made to the said INVESTORS by "the defendants" and to divers other persons and the public generally, and to swindle, cheat and defraud said INVESTORS and each, every and all thereof, and various and sundry other persons, and the public generally, out of all of the said sums of money and the said property that the said INVESTORS and various other persons, and the public generally, should pay over and deliver to "the defendants" or either thereof, or to the said corporation;

That for the purpose of inducing, inciting and procuring the said INVESTORS and various and divers other persons and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to "the defendants" and to the said corporation, money and property in exchange and payment therefor, "the defendants" would falsely and fraudulently and by means of printed advertisements to be by "the defendants" inserted in newspapers, in pamphlets,

in catalogues, in circulars and in letters, and to be written in letters, which said newspapers, pamphlets, catalogues, circulars and letters were to be by "the defendants" transmitted and caused to be transmitted and sent by and through, and by means of the postoffice establishment of the United States, to the said INVESTORS and to divers other persons, and by words to be orally spoken by "the defendants" represent, pretend and promise that the said corporation, owned the patents to a certain "CHANGE COMPUTING MACHINE," a certain "BANK CASHIER MACHINE," a certain "LIGHTNING CHANGE MAKER," a certain "CURRENCY PAYING MACHINE" and a certain "NEW STYLE ADDING MACHINE," and that the said corporation was engaged in the business of manufacturing and selling said machines, and each, every and all thereof; that on account of the said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock of said corporation, were of great commercial value and that large dividends would be by said corporation declared and paid thereon to the said INVESTORS and to all other persons who should purchase the same from "the defendants" or from the said corporation; that said corporation would declare and pay to all of said INVESTORS, and to divers other persons, and to all persons who should purchase the shares of stock from said corporation large and certain dividends upon said stock within six months from the date that any of said persons should purchase any of said shares of stock from "the defendants," or

either thereof, or from said corporation; and that the said corporation was the owner and in the possession of large bona fide orders for the purchase of said machines and that on account of said orders for the said machines the said corporation would make a large and certain profit; that the financial condition of the said corporation was excellent, and that the assets of said corporation far exceeded in value the total amount of the liabilities against and owned by said corporation; that a certain large amount of the capital stock of said corporation, which said stock would be offered for sale to the said INVESTORS and to divers other persons and the public generally, belonged to and was the property of the said corporation, and that the money derived from the sale thereof would be by said corporation invested and used in such a manner as to increase the assets of said corporation, and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines; that inasmuch as the assets of said corporation exceeded and was greater than the liabilities of said corporation, "the defendants" were justified in raising and increasing the selling price of said shares of stock from the said par value of ten dollars each to a selling price of eleven dollars each; from a selling price of eleven dollars each to a selling price of twelve dollars and fifty cents each; from a selling price of twelve dollars and fifty cents each to a selling price of fifteen dollars each; from a selling price of fifteen dollars each to a selling price of twenty dollars each; from a selling price of twenty dollars each to a selling price of thirty dollars

each; and from a selling price of thirty dollars each to a selling price of fifty dollars each.

That in truth and in fact and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, neither the said corporation, nor any of "the defendants" owned the patents to said certain "CHANGE COMPUTING MACHINE," or said certain "LIGHTNING CHANGE MAKER," or said certain "CURRENCY PAYING MACHINE," or said certain "NEW STYLE ADDING MACHINE," or either thereof; and

That in truth and in fact and as "the defendants" and each, every and all thereof, at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the said corporation was not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock; and

That in truth and in fact and as "the defendants", and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, the said shares of stock and each, every and all thereof, were of very little value and of practically no value whatsoever, and said shares of stock and each, every and all thereof were practically worthless; and

That, in truth and in fact and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, no dividends whatsoever would ever be by said corporation, either declared or paid to the said INVESTORS, or to any other person who should purchase the said shares of stock by either the said corporation, or by any of "the defendants"; and

That in truth and in fact and as "the defendants," and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, none of the said INVESTORS, or any other person who should purchase said shares of stock, would ever receive, either from said corporation or from "the defendants" any dividend whatsoever; and

That in truth and in fact and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the said corporation, was neither the owner nor in the possession of the said alleged bona fide orders for the purchase of said machines; and

That in truth and in fact and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the financial condition of said corporation was not excellent but on the

contrary at and during all of the times and dates mentioned, specified and stated in the indictment, and as "the defendants" then and there well knew, the said corporation was absolutely insolvent; and

That in truth and in fact and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the value of the assets of said corporation amounted to a sum much less than the total amount of the liabilities against and owed by said corporation; and

That in truth and in fact and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, a very large amount of the shares of stock of said corporation, which "the defendants" were to represent as being the property of the said corporation, consisted of shares of stock owned by "the defendants" and all of the sums of money and all of the property received on account of the sale thereof would be appropriated by "the defendants" and none of the same or any part thereof would be paid into the treasury of the said corporation, to be used by it, either for increasing the assets of said corporation, or otherwise; and

That in truth and in fact, and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, none

of "the defendants" or any thereof, were at any time on account of the financial condition of said corporation justified in either raising or increasing the selling price of said shares of stock or any thereof; and

That in truth and in fact and as "the defendants" and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, each and every person who should purchase any of said shares of stock from "the defendants" or from said corporation, would suffer and sustain a loss on account of said transaction of all sums of money which any of said persons should pay over or deliver to "the defendants" or to said corporation, in exchange or payment for said shares of stock.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy so entered into by "the defendants" that said scheme and artifice to defraud the said INVESTORS and divers other persons, and the public generally, should be by "the defendants" carried out, carried on and effected by the further means, methods, manner and plan, that is to say, that for the purpose of inducing, inciting and procuring the said INVESTORS and divers other persons, and the public generally, to purchase said shares of stock from said corporation and from "the defendants" and to pay over and deliver to "the defendants," and to the said corporation, money and property in exchange and in payment therefor, "the defendants" would from time to time during the existence of said conspiracy, fraudulently and dis-

honestly publish and cause to be published, false and untrue written and printed statements of the assets of said corporation, and false and untrue written and printed statements of the liabilities owed by said corporation, and false and untrue written and printed statements of the financial condition of said corporation. That in said false and untrue statements of the assets of said corporation, and in each, every and all thereof, the assets of said corporation would be by "the defendants" stated to be sums greatly in excess of the true value of all of the assets of said corporation; that in said false and untrue statements of the liabilities owed by said corporation, and in said false and untrue statements of the financial condition of said corporation and in each, every and all thereof, there would be by "the defendants" omitted therefrom liabilities owed by said corporation amounting to more than the sum of one-half million dollars;

That it was a further part and portion of said wilful, unlawful and felonious conspiracy so entered into by "the defendants" that said scheme and artifice to defraud the said INVESTORS and divers other persons, and the public generally, should be carried out, carried on and effected by "the defendants" selling said shares of stock to the said INVESTORS and to divers other persons in the following states, namely, Oregon, Washington, California, Idaho, Montana, Wyoming, Utah, Texas, Iowa, North Dakota, Michigan, Illinois, Colorado, New York and many and divers other states; that "the defendants" would so manage and control the business affairs of said corporation, to the end that more

than twenty-five per cent of all of the sums of money which should be by the said INVESTORS and by divers other persons and by the public generally, paid over, delivered and transferred to said corporation, and to "the defendants" in exchange and payment for said shares of stock, would be appropriated by "the defendants" to their own use and gain; that for the purpose of inducing, inciting and procuring the said INVESTORS and various and divers other persons and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to "the defendants" and to the said corporation, money and property in exchange and payment therefor, "the defendants" would increase the selling price of said shares of stock from the said par value of ten dollars each to a selling price of eleven dollars each; from a selling price of eleven dollars each to a selling price of twelve dollars and fifty cents each; from a selling price of twelve dollars and fifty cents each to a selling price of fifteen dollars each; from a selling price of fifteen dollars each to a selling price of twenty dollars each; from a selling price of twenty dollars each to a selling price of thirty dollars each; and from a selling price of thirty dollars each to a selling price of fifty dollars each; by placing and causing to be placed in the postoffice of the United States, at Portland, in Multnomah County, Oregon, and causing to be delivered by the postoffice establishment of the United States, the said newspapers, pamphlets, catalogues, circulars and letters, and other letters to be written by "the defendants" which said letters would request the said INVESTORS and divers other persons to remit and to pay to "the de-

fendants” and to said corporation money in payment and exchange for said shares of stock, all of said newspapers, pamphlets, catalogues, circulars, and letters, to be sent and delivered by the postoffice establishment of the United States to the persons to whom addressed in pursuance of said conspiracy;

That the said conspiracy, combination and agreement aforesaid should and would continue from the said 1st day of September, 1910, until and including the 1st day of January, 1915; that said conspiracy was to be a continuing conspiracy, and that it was to continue at all times between the 1st day of September, 1910, until and including the 1st day of January, 1915, and that at and during all of the times and dates ‘the defendants’ would continue to be parties to said conspiracy and would continue to commit the said acts, and crimes hereinbefore set forth in detail.

That the said wilful, unlawful and felonious conspiracy, combination and agreement, aforesaid, so entered into by “the defendants” on or about the 1st day of September, 1910, continued from the date of said conspiracy until and including the 1st day of January, 1915; that at and during all of the times and dates between the said 1st day of September, 1910, and the 1st day of January, 1915, said wilful, unlawful and felonious conspiracy, combination and agreement was continually in existence and in operation, and at and during all of said times “the defendants” continued to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the said crime hereinbefore set forth in

detail. Over sixty witnesses were called by the plaintiff to prove this state of facts, and the greater portion of said facts was proven by the plaintiff by the introduction of a large number of letters and telegrams passing between "the defendants," and between "the defendants" and the INVESTORS. It was also proven that during all the time of the operation of the United States Cashier Company, that it was the custom of the defendant Menefee, acting as the president of the company, and of the defendant LeMonn, acting as the sales manager of the company, to frequently send to the agents of the United States Cashier Company who would be located at points far distant from Portland, Oregon, letters and telegrams advising said agents that the price of stock of the United States Cashier Company was about to be advanced, and that the purpose in writing these letters and sending these telegrams upon the part of the said Menefee and the said LeMonn was that the agent of the company receiving said letters and said telegrams would show the same to prospective purchasers of stock for the purpose of hurrying the said prospective purchaser into making a purchase of said stock, and that it was an habitual custom of the said Menefee and the said LeMonn and the said agents in the field, to follow this practice in inducing prospective purchasers to invest; that frequently the agents of the company in the field would write letters and send telegrams to Menefee and LeMonn requesting that a certain kind of letter or telegram be sent said respective agents, which said letters would mention the proposed advancement in the price of stock, and would contain other information calculated to induce the pros-

pective purchaser to make haste in making the said investment, and that the defendants Menefee and LeMonn upon receipt of such telegraphic and written requests from the agents in the field would, as a matter of custom, immediately comply with the request made by said agent. It was further proven that for the purpose of inducing prospective purchasers to purchase the stock of the said corporation, that the defendant Menefee and the defendant LeMonn caused to be created a board known and designated as a Board of Advisers, composed of a large number of stockholders of the said United States Cashier Company who were prominent in business circles and that the list of these names was published by Menefee and LeMonn and sent broadcast all over the country as an inducement to the prospective purchasers to purchase the stock of the United States Cashier Company.

That in a number of instances a prospective purchaser would be by Menefee and LeMonn and the agent in the field promised and given a place on this Advisory Board as an inducement for the purchase of stock. That in a number of instances, the defendant Menefee and the agent in the field would cause to be issued to the purchasers of said stock who thus secured places upon the Advisory Board, special contracts, in which the purchaser of said stock would be by the United States Cashier Company promised an earlier dividend than the other holders of said stock, and all this was done without the knowledge or consent of any of the other stockholders of the United States Cashier Company. It was further proven that the duties of the Board of Advisors were

purely nominal, and that in reality the only purpose in creating such Board of Advisors was to induce a large number of men to believe that said Board of Advisors actually had some control over the affairs of the United States Cashier Company; it was further proven that many of the members of the so-called Advisory Board whose names were so published and used did not know of their membership upon said Board until after the indictment in this case had been made public. There was, however, no evidence whatsoever introduced at the trial that the defendant Gernert took any part in the sending of any of said telegrams or letters or had anything to do with the creation of the Advisory Board or the issuance of said preference contracts, or, in fact, had any knowledge of the existence of any of said things other than that evidence herein in this Bill of Exceptions specifically set forth.

And the plaintiff offered evidence tending to prove that in pursuance of the said conspiracy and to effect the object thereof, the defendants B. F. Bonnewell, Frank Menefee, and F. M. LeMonn committed each, every and all of the overt acts that are mentioned, specified and stated in the indictment in the manner and at the several times and places respectively alleged and stated in said indictment.

The plaintiff offered evidence which was received and which tended to prove that during all of the times stated in the indictment the Portland Oregonian, The Oregon Daily Journal, and The Evening Telegram were newspapers published and issued daily and regu-

larly at Portland, in Multnomah County, Oregon; that during said times said newspapers and each thereof had a circulation of more than 25,000 and that more than 25,000 copies of said papers and each thereof were, during all of the times stated in the indictment, daily and regularly transmitted through the agency of the postoffice department at Portland, Oregon, to more than 25,000 subscribers located in all parts of the United States; that the defendant, Frank Menefee, and the defendant, F. M. LeMonn, inserted in said newspapers, and each, every and all thereof, the following hereinafter described advertisements of the United States Cashier Company, and copies of said papers from the files of said newspaper offices were introduced in evidence by the plaintiff. Each of said newspapers containing said advertisements displayed the names of all of "the defendants" and the defendant Thomas Bilyeu and the defendant O. E. Gernert, as officers of said corporation, namely, the United States Cashier Company. The advertisements referred to are as follows:

Government's exhibit No. 17 was page 9 of the issue of the Oregon Daily Journal of date October 30, 1910. This was a display advertisement containing two cuts of machines, model No. 1 being the Bilyeu cashier, and model No. 2 being the Potter cashier. The advertisement contained the statement that the "value of the patent rights for the Bilyeu Automatic cashier for the United States alone is almost priceless," and an invitation was offered the public to purchase the stock.

Government's exhibit No. 18 is page 7 of the Oregon Daily Journal of date November 20, 1910, displaying a similar advertisement as shown in Government's exhibit No. 17.

Government's exhibit No. 19 is page 3 of the issue of the Oregon Daily Journal of date November 27, 1910, containing substantially the same advertisement as Government's exhibit No. 17, with the exception that the announcement is made that the stock "will positively advance ten per cent on the 6th day of December, 1910."

Government's exhibit No. 20 is page 18 of the issue of the Oregon Daily Journal of date December 1, 1910, containing an advertisement substantially the same as the advertisement shown in Government's exhibit No. 19.

Government's exhibit No. 21 is page 10 of the issue of the Oregon Daily Journal of date December 5, 1910, which is substantially the same advertisement as Government exhibit No. 17, with the exception that the statement is made therein that the company will pay one hundred per cent.

Government's exhibit No. 23 is page 13 of the issue of the Oregon Daily Journal of date June 23, 1911, showing an advertisement substantially the same as Government's exhibit No. 17, with the exception that the statement is made that the company will pay one hundred per cent annually.

Government's exhibit No. 24 is page 12 of the issue of the Oregon Daily Journal of date June 27, 1911,

showing an advertisement substantially the same as Government's exhibit No. 17.

Government's exhibit No. 25 is page 15 of the issue of the Oregon Daily Journal of date June 29, 1911, showing an advertisement substantially the same as Government's exhibit No. 17.

Government's exhibit No. 26 is page 12 of the issue of the Oregon Daily Journal of date June 30, 1911, containing an advertisement substantially the same as shown in Government's exhibit No. 17.

Government's exhibit No. 27 is page 12 of the issue of the Oregon Daily Journal of date October 17, 1911, which advertisement is substantially the same as Government's exhibit No. 17, and in addition thereto the following statements are contained therein:

"AT LAST"

**"A CASH REGISTER, ADDING
MACHINE, AND CHANGE COM-
PUTER ALL IN ONE."**

"Don't fail to see it in actual operation.

"Demonstrations at 266 Stark Street—Open evenings.

Followed by a general description of computing machine and its functions.

References to millions made by Cash Register and millions made by Adding Machine people.

The Change Computing Machine of United States Cashier Co. greater than either of these.

Giving figures of estimated profits.

Giving partial list of officers, advisory board, and directors.

Urging immediate investment because stock positively advanced to \$20 in a few days, and this is the last opportunity to buy at \$15 per share.

“The change-computing machine alone is sufficient to return the original investors tremendous profits.

“In addition to change-computing machine, the United States Cashier Company owns and controls four other equally wonderful and equally essential machines, viz.—the Bank Cashier, also a lightning change-maker; a currency-paying machine, also a new style adding machine. Any one of the above machines insures big returns, and future profit of the United States Cashier Company, owning and controlling as it does patents of five such marvelous machines, is impossible of calculation.”

Government's exhibit No. 31 is page 15 of the issue of the Evening Telegram of date November 17, 1910.

Government's exhibit No. 32 is page 10 of the issue of the Evening Telegram of date November 19, 1910.

Government's exhibit No. 33 is page 5 of the issue of the Evening Telegram of date November 23, 1910.

Government's exhibit No. 36 is page 5 of the issue of the Evening Telegram of date December 5, 1910.

Government's exhibit No. 37 is page 5 of the issue of the Evening Telegram of date March 11, 1911.

Government's exhibit No. 38 is page 13 of the issue of the Evening Telegram of date June 21, 1911.

Government's exhibit No. 39 is page 9 of the issue of the Evening Telegram of date June 26, 1911.

Government's exhibit No. 40 is page 11 of the issue of the Evening Telegram of date June 28, 1911.

Government's exhibit No. 41 is page 11 of the issue of the Evening Telegram of date June 30, 1911.

Each, every and all of the advertisements in the Telegram were substantially the same as those in the Oregon Daily Journal.

Government's exhibit No. 42 is page 11 of the issue of the Evening Telegram of date October 11, 1911. This advertisement is substantially the same as Government's Exhibit No. 17, and in addition thereto there appears therein the following statement:

**"METHODS OF HANDLING MONEY
WILL BE REVOLUTIONIZED!"**

**"EXTENSIVE PRODUCTION OF MAR-
VELOUS MECHANICAL BRAIN."**

**"PRODUCT OF UNITED STATES CASH-
IER COMPANY TO BEGIN IMME-
DIATELY."**

Two cuts of machines and automatic bank cash-
ier. Between the cuts, the following quotation:

**"Much has been said and written of the won-
derful machines which have been in process of per-**

fection by the United States Cashier Company for the past twelve months. Operations have now reached the stage where the extensive production of these wonderful machines commences immediately and deliveries will be made in about 90 days. They promise to outrival the cash register, adding machine, and typewriter in usefulness. In fact, will revolutionize the present systems of handling money. This is a broad statement, but one that is amply borne out by the machines themselves.

“For instance, the change-computing machine makes exchange mechanically, quickly, and accurately. Suppose you purchase \$4.25 worth of merchandise and tender \$10 in payment. All that is necessary is to depress the keys representing the amount purchased and the amount tendered, pull the lever, and the machine pays \$5.75, the exact change. The operation is completed quicker than any human calculator can ever hope to do it, besides being absolutely correct. In addition a visible permanent record is made of both transactions, besides totaling each sale as made.

“It is safe to state that there never was a machine placed on the market for which there is such a great actual need.

“The change-computing machine alone is sufficient to return the original investors tremendous profits.

“In addition to the change-computing machine, the United States Cashier Company owns and con-

trols four other equally wonderful and equally essential machines, viz.—the Bank Cashier, also a lightning change-maker; a currency-paying machine, also a new style adding machine. Any one of the above machines ensures big returns, and the future profit of the United States Cashier Company, owning and controlling as it does patents of five such marvelous machines, is impossible of calculation.

“RECORD OF THE UNITED STATES CASHIER COMPANY UNPARALLELED.

In all respects the record of the United States Cashier Company stands unparalleled. The United States Cashier Company has been financed in less time than any other of the present day great successes. Since the company was first launched a little over a year ago, the leading bankers, business men, and capitalists of this city and the Pacific Coast have subscribed for a sufficient amount of stock to assure its success. Today the assets of the United States Cashier Company (not including patents, which are conservatively valued at not less than \$500,000) are over \$400,000, including real estate, factory, equipment, machines, material, cash, and bills receivable.

“The only stock remaining unsold is 15,000 shares which are held in escrow by one of Portland’s leading banks for the payment of the original patent rights. The United States Cashier Company has

the right to redeem this stock any time within twelve months.

“On or before November first, the United States Cashier Company stock will positively advance to \$20 per share. The last block of stock offered was eagerly purchased by keen business men at \$15 per share.

“Accordingly, instead of waiting to redeem this patent stock when it is due twelve months from now, the Board of Directors have decided to offer it now, while it lasts, subject to previous reservation, at \$15 per share. This will enable those who have recently made application for stock to be taken care of and will also afford a large manufacturing fund ample to meet any contingencies that might arise.”

Government's Exhibit No. 43 is page 13 of the issue of the Evening Telegram of date October 19, 1911, containing an advertisement substantially the same as shown in Government's Exhibit No. 17. In addition thereto the following statement is made:

“The change-computing machine alone is sufficient to return original investors tremendous profits.

“In addition to the change-computing machine, the United States Cashier Company owns and controls four other equally wonderful and equally essential machines, viz.,—the bank cashier, also a lightning change-maker; a currency-paying machine, also a new style adding machine.

"Any one of the above machines insures big returns, and the future profit of the United States Cashier Company, owning and controlling as it does five such marvelous machines, is impossible of calculation.

"Stock positively advanced to \$20 in a few days.

"Last opportunity to buy at \$15 per share.

"Remember: Only a few shares remain.

"Time to act is now; the first thing tomorrow morning.

"Call, phone, write, or wire.

United States Cashier Company.

"Manufacturers of automatic, computing, change-making, recording, coin-paying machines, and adding machines."

Government's Exhibit No. 44 is page 10 of the issue of the Evening Telegram of date October 30, 1911, which contains an advertisement substantially the same as shown in Government's Exhibit No. 17, with the following addition:

"ONLY ONE DAY MORE

**"LAST OPPORTUNITY TO BUY UNITED
STATES CASHIER COMPANY
STOCK AT \$15.00."**

**"POSITIVELY ADVANCES TO \$20 NO-
NOVEMBER 1."**

Containing a description of the computing machines, automatic bank cashier, change-computing,

currency-paying, lightning change maker, and adding machine, and the statement regarding the breaking of all records by the United States Cashier Company in its financing, and containing following quotation, underscored:

"The United States Cashier Company not only controls one of the above machines—any one of which would return big profits, but owns and controls patents and rights to all of them."

"REMEMBER: Only one day more at \$15. Stock positively advanced to \$20 November 1.

"Call, Write, or Wire."

Government's Exhibit No. 47 is page 9 of the issue of the Morning Oregonian of date March 11, 1911.

Government's Exhibit No. 48 is page 15 of the issue of the Morning Oregonian of date June 22, 1911.

Government's Exhibit No. 49 is page 5 of the issue of the Morning Oregonian of date June 27, 1911.

Government's Exhibit No. 50 is page 9 of the issue of the Morning Oregonian of date June 29, 1911; said four last mentioned exhibits and each thereof contained an advertisement of the United States Cashier Company substantially the same as shown in Government's Exhibit No. 17.

Government's Exhibit No. 51 is page 11 of the issue of the Morning Oregonian of date October 8, 1911, which shows an advertisement substantially the same as Government's Exhibit No. 17, with the following addition:

**"METHODS OF HANDLING MONEY
WILL BE REVOLUTIONIZED."**

"EXTENSIVE production of marvelous mechanical brain—the product of the United States Cashier Company—to begin in about 90 days."

"RECORD OF UNITED STATES CASHIER COMPANY UNPARALLELED."

"In all respects the record of the United States Cashier Company stands unparalleled. The United States Cashier Company has been financed in less time than any other of the present day great successes. Since the company was first launched a little over a year ago, the leading banks, business men, and capitalists of this city and the Pacific Coast have subscribed for a sufficient amount of stock to assure its success. In fact, staid banks which never before endorsed anything of this nature, lent their enthusiastic support in most strongly worded testimonials **IN WRITING**. Today the assets of the United States Cashier Company (not including patents) are over \$400,000, including real estate, factory equipment, machinery, machines, material, cash, and bills receivable."

"ONLY 15,000 SHARES REMAIN."

"The only stock remaining unsold is about 15,000 shares which are held in escrow by one of Portland's leading banks for payment of the original patent rights."

“The United States Cashier Company has the right to redeem this stock any time within twelve months.”

“Much has been said and written of the wonderful machines which have been in process of perfection by the United States Cashier Company for the past twelve months. Operations have now reached the stage where from present indications extensive production of this wonderful machine will commence in about 90 days. They promise to outrival the cash register, adding machine and typewriter in usefulness. In fact, will revolutionize the present system of handling money. This is a broad statement, but one that is amply borne out by the machines themselves.

“The computing machine alone is sufficient to return original investors of the United States Cashier Company tremendous profits. \$100 invested in National Cash Register stock returned \$42,780.

“In addition to the computing machine, the United States Cashier Company has perfected and patented four equally wonderful and equally essential machines, viz.—bank cashier, which permits paying checks rapidly by bank cashiers, as well as keeping a record of each transaction; a machine that banks have needed and wanted for years. Also a lightning change maker for pay-as-you-enter cars, theaters, etc., a currency paying and computing machine which pays paper

money, gold, and silver, with equal facility and correctness. Also a new style adding machine, which is more flexible than any now on the market and has less parts. Bank clerks cannot make mistakes. Paying tellers are saved hours of time each week. Department stores will quicken their service; merchants will be able to stop losses now impossible. In short, the whole system of handling money will be revolutionized.

“Any one of the above machines insures big returns, and the future profit of the United States Cashier Company, owning and controlling as it does five such marvelous machines, is impossible of calculation. The patent rights are virtually priceless and the demand for such money-saving, labor-saving devices is unlimited.”

Government's Exhibit No. 52 is page 6 of the issue of the *Oregonian* of date October 15, 1911, containing an advertisement in which the following statement appears:

“The change computing machine alone is sufficient to return original investors tremendous profits.

“In addition to the change computing machine, the United States Cashier Company owns and controls four other equally wonderful and equally essential machines, viz.—the bank cashier, also a lightning change maker; a currency-paying machine, also a new style adding machine. Any one of the above machines insures big returns, and the future profit of the United States Cash-

ier Company, owning and controlling as it does, five such marvelous machines, is impossible of calculation."

Government's Exhibit No. 54 is page 12 of the issue of the Oregonian of date October 29, 1911, containing an advertisement substantially the same as Government's Exhibit No. 44, with the following addition:

"The United States Cashier Company not only controls one of the above machines,—any one of which would insure big profits, but owns and controls patents and rights to all of them."

Each of the exhibits containing said advertisement showed full page display advertisements.

And the plaintiff offered testimony which was received and which tended to prove that the American Cash Record Company was a corporation organized and existing under the laws of the state of Washington, and that during all of the times mentioned, specified and stated in the indictment the defendant, Thomas Bilyeu, was the president and a director thereof, and was the owner of one-fourth of its capital stock; that the United States Cashier Company, on September 28, 1910, purchased from the American Cash Record Company applications for patent No. 555,552; No. 519,489 and No. 522,240, for a purchase price of \$200,000 in cash and \$60,000 of the stock of the United States Cashier Company; that from time to time thereafter and up to and including the year 1913, the United States Cashier Company made many cash payments to the American Cash

Record Company and to the defendant Thomas Bilyeu, and that the defendant Bilyeu, during these years, received in cash from the United States Cashier Company, on account of said contract, more than the sum of \$50,000; that in November, 1911, the United States Cashier Company purchased from the defendant Thomas Bilyeu certain patent rights covering the same applications for the republic of Mexico for the sum of \$15,000, but that the United States Cashier Company never did anything with any of these rights; that in June, 1912, the United States Cashier Company purchased from the defendant Bilyeu and one Overlin the rights to a currency machine that had been built by Overlin. The consideration of this purchase was that the company was to sell for Bilyeu and Overlin 1600 shares of stock owned by them and to pay them for the stock at the rate of \$12.50 per share.

There was evidence tending to show that the defendant Bilyeu saw the advertisements in the Oregonian, Journal and Telegram heretofore referred to in this bill. The plaintiff offered evidence tending to prove that upon one occasion the defendant Bilyeu had assisted in the sale of the stock of the United States Cashier Company and had represented to the purchaser that the company owned the patents to all the machines which it was advertising and selling. The plaintiff offered evidence tending to prove that during all of the times mentioned in the indictment the defendant Bilyeu was a duly licensed and regularly admitted patent attorney.

At the conclusion of all the testimony offered by both the plaintiff and "the defendants," the court directed a verdict in favor of the defendant Bilyeu.

The plaintiff offered evidence which was received and which tended to prove that the defendants Menefee and LeMonn, for the purpose of inducing prospective purchasers to purchase the stock of the United States Cashier Company had written letters to said prospective purchasers in which the statement was made that the patent office at Washington, D. C., could not give the company a single citation wherein the patents of the United States Cashier Company were infringing on any other patents previously granted and that the United States Cashier Company had made extensive research by the ablest patent attorneys in Washington, D. C., and that said patent attorneys had assured the company that they had full protection for all time to come;

And the plaintiff offered testimony which was received and which tended to prove that prior to the time that said last mentioned letters were written and that during all of the times thereafter, John F. Robb, of Washington, D. C., was the patent attorney for the said United States Cashier Company; that prior to the time that Menefee and LeMonn had written the said letters stating that the patents of the United States Cashier Company did not infringe any prior issued patent, and that the patent office at Washington, D. C., could not give the United States Cashier Company a single citation wherein the patents of the said company

would infringe on any other patents previously granted, and that the patent attorneys for the United States Cashier Company had assured it that it had full protection for all time to come; that the defendants Menefee and LeMonn had received from the said patent attorney, John F. Robb, written notice that certain prior issued patents, one issued to a man by the name of Lindeloff and two others issued to the National Cash Register Company, would be infringed by the applications for patents of the said United States Cashier Company, and that the application of the United States Cashier Company for the patent to the Bilyeu cashier and the application of said company for the patent to its computing machine would infringe said prior issued patents;

And the plaintiff offered testimony which was received and which tended to prove that during the times mentioned, stated and specified in the indictment, the United States Cashier Company received in cash from the said INVESTORS and many and divers other persons on account of the sale of capital stock to said persons in cash the sum of \$760,165; that it had disbursed over \$400,000 to its agents as commissions upon the sale of its capital stock; that the defendant F. M. LeMonn received a commission of ten percent. of all amounts received for the sale of said capital stock; that the defendant Frank Menefee received a commission of ten per cent upon said sales; that to the agent making the sale of said stock there was by said corporation paid a further and additional commission of thirty per cent on account of the sale of said capital stock; that approx-

imately \$1,500,000 in cash and property were received by the said United States Cashier Company during said times on account of the sales of its capital stock; that no dividend was ever declared to any of the stockholders of said corporation and that the company was never in a position to declare or pay any dividend; that each, every and all of "the defendants" received large sums of money from the said United States Cashier Company over and above all of the amounts paid in to said company by them and each of "the defendants" made large profits during all of said times in selling and disposing of their own personal stock of said corporation.

As to the defendant O. E. Gernert, the testimony ~~hereinbefore~~ set out in this Bill of Exceptions was the sole and only testimony offered by the Government relating to said defendant, and except as ~~hereinbefore~~ shown there was no other evidence, words or testimony of any kind or nature offered by the Government or by the defendant Gernert tending to prove, or from which inference might be drawn from connecting of the defendant O. E. Gernert with the alleged conspiracy set out in the indictment, or that tended to prove defendant O. E. Gernert knew, had knowledge of, or believed at any time prior to the finding of the indictment that the United States Cashier Company did not own the patents to the change computing machines, lightning change maker, currency paying machine, or the new style adding machine, or that the defendant Gernert had knowledge or information of, or believed that the company was not engaged in the business of manufacturing or

selling its machines, or any thereof, or that its sole business was to sell and dispose of shares of its capital stock, or that the defendant Gernert knew, had information of, or believed that the shares of stock in said corporation were of very little value or were practically of no value whatever or were practically worthless; or that the defendant Gernert at any time mentioned in the indictment, knew, had information of, or believed that no dividends would ever be declared to paid to the investors in the capital stock of said corporation or that the defendant O. E. Gernert knew, had information of, or believed that none of the investors in the capital stock of said corporation would ever receive any dividend whatsoever; or that the defendant O. E. Gernert knew, had information of or believed that the Company was never the owner nor in the possession of bona fide orders for the purchase of the machines of the United States Cashier Company; or that the said defendant O. E. Gernert knew, had information, or believed that the financial condition of the Company was not excellent; or that the same was absolutely insolvent; or that the said defendant Gernert knew, had information, or believed that the assets of the United States Cashier Company were of much less value than its liabilities; or that the defendant O. E. Gernert knew, had information of, or believed that a very large amount of the shares of stock of said corporation were represented by the various and several defendants as the property of the corporation and consisted of shares of stock owned by the defendants Menefee, LeMonn, Bilyeu, Gernert, Bonnewell, Todd, Hunter, Hopson, Muraine and Campbell,

and that the sums of money and property received on account of the sale thereof would be appropriated by the said defendants, and that none of the sum of any part thereof, would be paid into the treasury of the corporation, or that the defendant Gernert knew, had information or believed that none or any of the defendants were at any time on account of the financial condition of the Company, justified in raising or increasing the selling price of the stock of the Company; or that the defendant Gernert knew, had information, or believed that each, every or any person who should purchase the shares of stock of said corporation, would suffer a loss on account of said transaction of all or any of the sums of money paid by them for said stock; or that the said defendant Gernert at any time published false or untrue written or printed statements of the liabilities owed by said corporation; or as to the financial condition of the Company; or that he knew, had information, or believed that the statements of the financial condition of the Company or of the liabilities owned by it, were false or untrue in any particular; or that the said defendant Gernert knew, had information or believed that said statements as to the financial condition of the Company should or would be false or untrue; or that the defendant Gernert knew, had information or believed that such financial statements falsely placed the assets of the corporation at sums greatly in excess of the true value of the assets of the corporation; or that said financial statements should, would or did state amounts as to the liabilities of the corporation greatly less than the true amount of said liabilities; or that the

defendant Gernert knew, had information or believed that more than 25% of all sums of money paid by investors for the purchase of stock in said corporation would be, or were appropriated by the defendants to their own use and gain; or that the said defendant Gernert knew, had information or believed that the various increases in the price of the capital stock of the corporation, were not justified by its financial condition and its prospective value.

Whereupon C. B. Clark being called as a witness for the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Reames:

I live in Cashmere, Washington, and am a farmer by occupation. I have lived in Washington for seventeen years. In December, 1911, I met Mr. Sewall, an agent of the United States Cashier Company, and the defendant O. E. Gernert; Gernert had a machine with him and he was demonstrating it in one of the banks and I happened to be in the bank and watched him demonstrate it, and listened to the people ask certain questions about the working of the machine and heard Mr. Gernert explain it. I took part in the conversation for approximately a half an hour and then I engaged in conversation with Mr. Sewall. That is the only talk I had with Mr. Gernert at that time. I think Mr. Gernert told me that he was the assistant sales manager for the United States Cashier Company. At that time I bought twenty shares of stock at twenty dollars per share, and took an

option on an additional eighty shares. In June, 1912, I attended a stockholders' meeting of the company at Portland. I took lunch with Mr. Gernert and there he made a proposition something like this: That we could go in together and handle a thousand shares of the stock; a thousand shares, and in doing that get the agency of the state of Washington for selling the machines after they were manufactured, and that was the—the arrangement was completed during the day. I don't know whether—I don't think it was completed during lunch, but it was completed after the meeting in the afternoon; it was completed—that is in there it was. After the meeting was over, I went up to the main office and talked with Mr. Menefee a few minutes in the office, in his office; there were present in the office Mr. Gernert, Mr. Menefee and myself. I had bought eighty shares of stock and had given a note for \$1600 to the company for this eighty shares; I had first bought twenty shares for which I paid \$400 cash, and then had bought eighty shares for which I had given a note for \$1600. The note was due in July 1912, and in order to go in with Mr. Gernert on the thousand shares I felt as though I needed more time on the \$1600, and that was the talk with Mr. Menefee. He said if I done that, he would extend the note for me for the \$1600, and that is all the talk with Mr. Menefee at that time. The request I made was that if I took a part in the agency I could not raise the money for the \$1600 note at this time.

The Government offered, and there was received in evidence Government's Exhibit 242, being a letter of

date July 12, 1912, written by Gernert to the witness, the witness having testified that he received the letter through the mails.

Witness, continuing:

This letter had reference to the conversation that I had had with Mr. Menefee and Mr. Gernert in Portland. I saw Mr. Gernert in August, 1912, at Cashmere, Washington. He came over there and spent three or four days trying to sell some stock. He sold some, but I don't know just how much, a small amount. Then he went on back to Seattle to—I am a little ahead. Before he went back to Seattle we made arrangements—I made arrangements to raise \$2500.00 to pay for one hundred shares of the stock, and he said he had another man in mind that would take twice that amount, and he would take the same amount that I took, making \$10,000. And then he could go ahead with the moving stock—that is the re-selling of the stock to take care of the balance of the agency; the total amount that was to be paid for the stock by all of us was to be \$30,000; we raised the \$10,000, and Gernert thought perhaps he could sell the stock to take care of the balance or resell it rather. We would take hold of the stock then.

Q. Now, what was said by Mr. Gernert, if anything, as to what was to be done by the company with this money, and what stock it was that you were buying?

A. It was company stock, and the money was to be used by the company. He didn't outline in

detail what it was to be used for, but it was to be used by the company, as I understood it.

Q. Now, later, after that, did you have any conversation with Mr. Menefee about that transaction?

A. Well, quite awhile later, yes.

Q. How much later?

A. I think the last of November.

Q. Of what year?

A. The same year.

Q. Now, when you had that talk with Mr. Menefee about that, where was the talk, and what was said between you and Mr. Menefee about that transaction?

A. It was at the company's office in Portland. There is some little explanation before that. When Mr. Gernert left Cashmere, I hadn't heard from him from that time. It seems to me like I did write him a letter between that and the time I seen Mr. Menefee, but I won't be sure as to that. And if I did, I must have received an answer from him, which I can't say here now, but it does seem to me like I wrote him and got an answer, but that is all I had from Mr. Gernert; he had gone on a trip somewhere, seems to me like up into Canada, and he wrote me that he couldn't do anything with the business at that time; he was engaged in something else that was pushing him, and when he got back from there, he would go ahead with this business. Then it came

on towards fall, and nothing being done, I came down to Portland to see Mr. Gernert. He wasn't in Portland, but I seen Mr. Menefee. I asked him about it, and he said for some reason Mr. Gernert had issued me, or transferred some of his own stock to me instead of the company's stock, which left me out of the agency.

Q. Well, what was said about how it was to be straightened up?

A. Well, I requested that something be done, and Mr. Menefee said at that time he could do nothing, and I didn't get in touch with Mr. Gernert until the stockholders' meeting in the spring; and I came down to the stockholders' meeting in the spring, and there I seen Mr. Menefee after the meeting was over, and we had another talk about it. In the meantime, I hadn't paid the \$1600, so I requested that he do that much—that he arrange somehow and return that note to me for that part of the twenty-five hundred that I had paid in, that I didn't feel like leaving in the company, and he said he would do his best to adjust that. He questioned just what he could do. He was only one of the directors, and he would have to bring it before the board.

At the time I had this transaction with Mr. Gernert, I gave the mortgage to Mr. Gernert; he got the money of a party in Seattle; the amount was \$2500 and the mortgage is still a lien upon my property. Mr. Gernert has never taken it up in any way or straightened it up,

and I have never been in touch with Mr. Gernert since that time.

Q. Here is a receipt dated August 9, 1912, which I would ask you to examine, and state whether or not that is a receipt that Mr. Gernert gave you for the \$2500?

A. Yes, sir.

Mr. Maguire: No objection to that.

Receipt offered in evidence, marked "Government's Exhibit 243," and read as follows:

\$2500.

August 9, 1912.

Received of C. D. Clark the sum of Two Thousand Five Hundred Dollars (\$2500) Payment for 100 shares of issued fully paid and non-assessable stock of United States Cashier Company, of Portland, Oregon, which is purchased from me this 19th day of August, 1912, subject to contract.

O. E. Gernert, ~~Agent~~

By.....Representative.

Q. Now you testified that the money that you paid was to go into the company for the purpose of building up the company, or to be used by the company. I notice that on the receipt that is signed, the word "Agent" is crossed out. I would like to have you examine that and tell the jury if you know how that came to be done, and when you noticed it.

A. As far as the crossing out of the agency part, I don't know anything about, although I do know

that Mr. Gernert was working or at this time we were working, seemingly independent of the company. It would seem that. This stock was to be—we were to take hold of this stock ourselves, and be responsible to the company for the stock.

Q. But what was said by Mr. Gernert as to what would be done with the money that you were putting up and paying?

A. It was to be paid into the company.

Q. Here is a letter of date August 19, 1912, which I wish you would examine and tell the jury how the letter came into your possession.

A. I received that through the mail.

Letter offered in evidence, received without objection, marked "Government's Exhibit 244," and read as follows:

UNITED STATES CASHIER CO.

August 19, 1912.

Mr. C. B. Clark,
Cashmere, Wash.

Dear Sir:

Enclosed we hand you certificate Number B. 5051 for one hundred shares of the capital stock of this company, payment for which you made to Mr. Gernert. You probably understand that this is the time of the year when it is most difficult to make sales of any property, and Mr. Gernert, as well as our salesmen in the field, report financial conditions

in their localities such that the selling of stock is a very hard proposition. Mr. Gernert advises us, however, that he expects to go to Toppenish, Washington, the first part of this week, and he has hope of placing quite a considerable block of stock there. The farmers in Toppenish should be realizing on their crops by this time, and if so, they will undoubtedly be more easily interested than they would otherwise. Mr. Gernert will doubtless keep you advised as to his progress.

Regarding the extension of time on your \$1600 note, we beg to advise that it is agreeable to us to make an extension of six months from the date of maturity of the old note, but will ask you to pay the interest to date at maturity, and give us a new note, which will enable us to have our records in a more satisfactory condition. Please therefore send us a remittance for \$64.00, and sign and return the enclosed note, and we will cancel and return to you the old one.

With best wishes, we beg to remain,

Yours faithfully,

Frank Menefee, President.

Witness continuing:

In regard to letter of date August 19, 1912, "Government's Exhibit 244," requesting a remittance of \$64, I remitted this amount to the company, and gave a new note for the sum of \$1600. Later I was notified by

Mr. Mears, one of the directors of the company, that the note was in his possession. The note has not yet been paid.

Whereupon the government offered, and there was received in evidence without objection "Government's Exhibit 245," the witness identifying the letter as one having been received by him through the mails.

Seattle, Washington, Dec. 28, 1914.

Frank Menefee
Strader Hotel,
4th and Marion.

Mr. B. Clark,
Cashmere, Washington.

Dear Sir:

Your letter of the 31st inst. has just reached me this morning here. It was addressed to Portland and was forwarded to me here the same day I left here to go to Portland to spend Christmas with the wife and babies, so I did not get it till my return here this A. M.

While I cannot feel that any of my actions with the affairs of this company were lacking in any respect in good faith and fairness, still the way matters have gone, I have felt, and do feel, that you ought not to have to pay the note that you gave. I have suggested all the while that you must not be pressed for payment, and I will write at once to Mr. Mears, and will take it up personally on my first

trip to Portland, which will be within the next few days, and can promise you that your note will be returned to you.

I know that matters have been most disappointing to all of us, and I am the heaviest loser of any one in every way. I have made nothing at all out of it, as everything I have has gone back into the company, and if we can be let alone, we believe that we will yet make good, but if we are to be harrassed and jumped upon at every turn, it all hurts the stockholders and the company, and only operates to prevent making a success. I believe you know and feel *and feel* that we have done the best we could and had not all this trouble come on that was started by Hume, things would even now be looking entirely different.

Kindly write me at the above address on receipt of this.

Yours faithfully,

Frank Menefee.

Witness continuing:

The note has never been returned to me. Referring again to the first talk I had with Mr. Gernert in December, 1911, at Cashmere, Washington, I identify the Bilyeu cashier as the machine that Mr. Gernert had with him at that time.

Cross examination by Mr. Maguire:

Mr. Gernert was in the bank demonstrating the machine and I heard him tell the people what the machine

would do and saw him demonstrating it. I did not see Gernert again until June, 1912, at which time I had a conversation with him relative to getting an interest in the state agency for the sale of these machines in the state of Washington.

Q. You understood that Mr. Gernert could obtain the agency by payment to the company of quite a large amount of cash, didn't you, something like \$25,000?

A. Yes, sir.

Q. That was the agency for the sale of the machines when they should be put upon the market?

Q. And the proposition then that was put up to you was that you could have a share in that agency by the payment of how much money?

A. Yes, sir.

A. Well, I was to start with \$2500, and if there was more required later, I might be obliged to put up more if we couldn't make the stock move, but at that time it was \$2500.

Q. \$2500. That money was to be paid to the company, as you understood it, for that agency? That is, for the state of Washington, with a whole lot more money Mr. Gernert and some one else should put up?

A. Well, was to be paid for stock, I might say, and through the stock we got the agency.

Q. Well, weren't you to pay for the agency by cash?

A. Well, it wasn't—

Q. Let me amend that—well, go ahead and explain.

A. Well, I was going to say I didn't understand we were paying for the agency of the company. We were paying, seems like, enough for the stock to get the agency, but of course the agency of the company with the stock.

Q. Agency of the company with the stock?

A. Yes, we got that by handling that stock, taking that stock from the company.

Q. How much stock was it all three of you were to subscribe for?

A. A thousand shares.

Q. A thousand shares?

A. Yes, sir.

Q. How did this \$25,000 come into the matter?

A. Well, we were to pay \$25,000 for the thousand shares of stock; we were to get that much money into the company, but we were to have a little time to get it in after we put up the first \$10,000.

Q. Now, let me refresh your memory on that Mr. Clark; wasn't the stock issued to you by Mr. Gernert, so that there would be some security for the company in this arrangement, and it was then understood that you and Mr. Gernert should go out and sell this stock in order to get the money back to put into the sales agency?

A. Yes, I was to help Mr. Gernert what I could to resell the stock, what was sold in my locality, yes—the amount that I was to—the part that I was to take, yes, sir.

Q. Now, this note for \$1600, that didn't have anything to do with this transaction at all? That was the first transaction that you had, the stock that you bought?

A. That is all.

Q. And that note, as I understand it, is held by the company today?

A. Yes, sir. Well, yes, with some of the company, yes, sir.

Q. Now, as I understand it, this is the receipt that you got from Mr. Gernert (Government's Exhibit 245).

A. Yes, that is the receipt.

Q. Mr. Gernert signed this receipt and gave it to you?

A. Yes, sir.

Q. And then you turned it over to whom?

A. I held it.

Q. I see. And it has been in your hands—

A. Ever since.

Q. All the time since then?

A. Yes, sir.

Q. Now, the United States Attorney was asking you about these inkmarks through the word

“agent,” and whether or not that was on there at the time you got it. Do I understand you to testify that these ink lines through that word were not on there at the time you got it?

A. No, sir; I didn't. They were there, and no one else ever put them there afterwards, because they were put up in my books, and nobody else ever had hold of them.

Q. Then, as I understand, this receipt is in the same condition now as it was when Mr. Gernert turned it over to you?

A. Yes, sir.

Q. And you read it at that time?

A. I didn't pay any attention to that agency mark.

Q. I didn't ask you that.

A. No.

Q. I asked you whether you read the receipt.

A. Oh yes, I looked over the receipt, and laid it away, yes, sir.

Q. Well, now, you understood that Mr. Gernert, in order to get the money to buy this agency for the sale of the machines, from the company, would have to sell a large amount, or a portion, at least, of his personal stock, didn't you?

A. Well, it would be our personal stock after it was transferred from the company, or in some way it had to be transferred from the company to us.

We had to handle the stock independent of the company.

Q. Yes. Now, you were to pay, you say, \$25 for this stock?

A. Yes, sir.

Q. And how much were you to sell it at?

A. We were allowed to sell it at \$30. That was the price that stock was selling at at that time.

Q. Well, these 100 shares which you obtained, you understood that in addition to that, Mr. Gernert had to raise his portion of the money too, didn't you?

A. Oh, yes, yes, sir.

Q. And you understood that that was to be raised by the sale of Mr. Gernert's personal stock, didn't you?

A. I don't know as we talked that. I don't know that I understood that exactly that way. We didn't go into details much about the selling, or what stock—how the stock would be issued, or anything of that kind.

Q. Well, you understood that Mr. Gernert had put in a considerable amount of his own funds into the stock of the company—purchased stock of the company, didn't you?

A. Well, I understood that he had a considerable amount of stock in the company, yes, sir.

Q. And his money was tied up there?

A. Yes, sir.

Whereupon it was stipulated by and between the Government and "the defendants," and the defendant Bilyeu and the defendant O. E. Gernert that the books and records of the United States Cashier Company had been by the employees of said company correctly kept, and that they correctly, accurately and truthfully showed the financial transactions of the United States Cashier Company, and that all entries appearing therein were and are correct and accurate records and entries, that prior to the indictment all of these books and records were voluntarily by the defendant Menefee turned over to and delivered to Hiram S. House, an expert accountant for the Department of Justice, who had had possession of the same at all times between the date of said delivery and the date said books and records were produced in court; and

It was further stipulated that Mr. House would be permitted to testify concerning his examination of said books and records and the facts shown and contained therein.

Whereupon said Hiram S. House, having been called as a witness for the Government, and being first duly sworn, testified as follows:

I am an expert accountant for the Department of Justice and have held such position for over eight years. Formerly I was employed in several national banks as an accountant. I have had a great deal of experience in the examination of books, records and accounts. For more than the period of one year I have been engaged in mak-

ing a careful examination of all of the books and records of the United States Cashier Company and am able to answer any questions concerning what is shown in said books and records relative to any of the financial transactions of said company. The same statement is true of the individual and private books and records of the defendant Frank Menefee.

Witness continuing:

The books of the United States Cashier Company show that the witness C. B. Clark received certificate numbered 2741 of date December 9, 1911, for twenty shares of stock; the stub of the certificate shows that it was transferred from certificate numbered 2279, which stood in the name of Frank Menefee. None of these funds went into the treasury of the company in payment for that stock. The books and records show that certificate numbered 3705 was issued to Mr. Clark on March 5, 1912, for eighty shares of stock. The stub shows that this was transferred from a certificate belonging to Mr. Frank Menefee. The witness testified that the stock was the personal stock that Menefee had previously purchased from one E. F. Circus. None of this money went into the treasury of the company in payment for this stock. On August 19, 1912, certificate numbered 5051 for one hundred shares of stock was issued to Mr. Clark. The books and records show that this certificate was transferred from certificate numbered 4981, which stock in the name of Frank Menefee, Trustee, and none of this money went into the treasury of the company in payment for that stock. The personal books of Mr. Menefee show

that on August 22, 1912, he received from Mr. Clark \$64, which was credited to interest account on Menefee's personal books. The books and records of the United States Cashier Company show that no part of this sum of \$64 went into the treasury of the company; as shown by the books and records of the company, no part of the sum of \$2500 paid by Mr. Clark or paid through the agency of the Clark mortgage went into the treasury of the company.

Whereupon the Government offered and there was received in evidence without objection and marked as Government's Exhibit Number 290 a letter written by the defendant Frank Menefee at Portland, Oregon, on December 5, 1911, to the defendant Gernert at Cashmere, Washington. The following is a copy of said letter:

"Dec. 5, 1911.

Mr. O. E. Gernert,
General Delivery,
Cashmere, Washington.

My dear Gernert:

Your letter received and was very glad to hear from you, as I thought you, Murraine and Sewall were lost somewhere in the shuffle. As requested, I am herewith enclosing you certificates as follows:

C. R. Yener	25 shares
J. W. Zufall	10 "
E. L. Williamson	5 "
Hilda Brennan	5 "

W. A. Decker	5 shares
B. H. Gritzmacher	10 “
G. H. Moore	10 “
Jno. Scott	25 “
Lew Paramore	50 “
W. Harris	5 “

These certificates are taken care of by me out of my own stock, and therefore the entire settlement is due to me until such time as we get together and divide the matter.

Everything is going fine with the company. We closed up the deal with the Sioux Falls people for \$25,000 and got \$8,000 cash, the balance February and March. It is in such shape that I feel there is no doubt about it going through alright.

I also got a settlement with the people down stairs, and had it my way. I had to be a little more liberal with the city lot question than I should have been, but I got all of the stock released and made a new contract entirely. We owe them now less than \$50,000 all told, and under the new contracts the payments of that are scattered over until next July. Things have been going in the office in such shape that we have a nice little surplus of money on hand and yours truly is trying his best to take care of it. I am getting along much better than I expected for this month, and when the big collections come in in January, there will be nothing to it.

Cash in all of this paper you possibly can, and send in whatever reports you have as to the details,

direct to me, as I will take good care of it and we can divide the situation up any time we are ready.

Enc.

Yours faithfully,

FM:MM.

Whereupon the Government offered and there was received in evidence without objection a letter written by the defendant Frank Menefee at Portland, Oregon, on December 9, 1911, to the defendant Gernert at Cashmere, Washington. The letter was marked as Government's Exhibit number 292. The following is a copy of said letter:

"Dec. 9, 1911.

Mr. O. E. Gernert,
Cashmere, Washington.

My dear Gernert:

Your letter of the 7th inst. is duly received, and as requested, I am herewith enclosing certificates of stock as follows:

C. B. Clark, Cashmere, Wn.	20 shares
C. A. Henston, " "	15 "
Phil Churchill, Snohomish, Wash,	5 "
Hugo Dotzer, " "	10 "

You must send in remittances and settlement for this stock, as it is issued because I am having a hard time taking care of the stock that is going to make up these reissued certificates, and must have settlements as fast as possible. Of course, you understand I settle with you personally for one-third net, etc.

By the way, it might be well to state in this letter my understanding in regard to your business as I believe we have never had a memorandum in regard to it.

In brief, it is this: That this stock you are selling is to be settled with me personally, and that you are to receive a commission of twenty-five per cent for selling same, you to pay all of the men out of this amount, who may be working with you on the deal. Out of the balance, or \$15.00 per share, you are to turn in for one-third of it your own certificates, one-third of it is to belong to me, and the other third to Mr. LeMonn. Also the sales should be made as nearly as possible on a cash basis. The financing of the men of course is to be paid out of the first cash received, and then we are to wait our turn when the settlements are made on the subscriptions for which you have to take paper and can not cash it.

Mr. Murraine is in and of course he has been given to understand the twenty-five per cent commission, but he seems to have found out from you that this is private stock that we are selling, but thinks it is mostly mine. In fact, I have not indicated that any of your stock is to go in on the deal, or for that matter any other stock but mine.

Enc.

Yours faithfully,

FM:MM

Whereupon the Government offered and there was received in evidence without objection, and marked as

Government's Exhibit Number 291, a latter written by the defendant Gernert at Seattle, Washington, on December 14, 1911, to the defendant Menefee at Portland, Oregon. The following is a copy of said letter:

"Frank Menefee	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary
O. E. Gernert,	F. M. LeMonn,
Asst. Gen. Sales Mgr.	Gen. Sales Manager
UNITED STATES CASHIER CO.	
Manufacturers	

(Picture)	(Picture)
Automatic Cashier	Automatic change com-
for banks, pay	puting machine
rolls, etc.	For Department and
	Retail Stores, etc.

AUTOMATIC COMPUTING
CHANGE-MAKING
RECORDING
COIN-PAYING MACHINES

(Picture)

Lightning change maker for theatres,
street cars, etc.

Portland, Oregon.

Seattle, Wash., Dec. 14, 1911.

Mr. Frank Menefee,
Portland, Oregon.

Dear Sir:

I have yours of the 5th and 9th instants. Sorry I could not answer before this, but we have been in

the hospital business for the past week. I was confined for several days, thought I had typhoid fever, but am feeling pretty good at present. Mr. Malt-house is laid up and has been for the past week with typhoid fever. I do not know what to do with the poor kid, who has not got any money and no friends. I am doing all I can for him toward paying his bills, have a nurse to take care of him.

I think as soon as he is able to get up, I will send him to Portland, as he has a sister there and if it comes to a matter of a little expense I think you will help him out a little in the city.

Muraine returned Sunday night. I have seen him Monday and Tuesday and he was drunk both these days. I am not paying any attention to him, and if he does not straighten up shortly and go to work, I will have to let him go.

I note what you say about everything going right with you at the other end and that the \$25,000.00 deal at Sioux Falls has been closed. I am tickled to death to know that you whipped the people down stairs into shape. With that off our hands, I do not think we have anything more to worry about. As to the \$50,000.00 that we still owe them, payable between now and July, we can easily meet that.

I am doing the best I can with my paper; however, money is a little tight in this part of the country. Still, the paper that I have is all gilt edge and it will come due in thirty, sixty, ninety days.

I will send you detailed report of all business done here and you can take care of same as you see fit. However, I have the thing well under way and properly systematized.

I leave all my paper at some bank in the town in which I do business, for collection, and when it is paid they will remit.

Note that you received the Stradley letter and that the Ladd & Tilton Bank does not seem to know anything about it. However, I think they will be more careful hereafter.

Your understanding regarding my contract is correct. I received a letter from LeMonn last week asking me if it was my understanding that while I was out on this deal, I would not be entitled to my \$75.00 a week. I did not answer his letter at all, for I thought it too ridiculous. I expect to see my \$75.00 credited to me just the same, as I am not out here on charity. I was rather surprised that Moraine should know of the private stock deal, as I told him nothing about it whatever.

I am waiting for a reply to a wire I sent to the State Senator asking him whether he could come in to Portland with me tonight. If he can, you will see me there Saturday morning. I will take up conditions with you in detail.

Sewell

I have sold ~~Worth~~ at Kent, as he wants to stay around the city until after the holidays.

Hoping you are well, and with kind personal regards, I am

Very truly yours,

O. E. Gernert.

Whereupon the Government offered and there was received in evidence and marked as Government's Exhibit Number 288, a letter written by the defendant Gernert to the defendant LeMonn under date of February 27, 1912. The following is a copy of said letter:

"THE STOCKTON

Stockton, Cal.

2/24

My dear LeMonn:

I have yours of the 27th. As to this country give me two inches of rain and I'll come home with forty feet of gold. What is Amsden doing in Sacramento he is hiring men posing as fiscal ag't. A fellow by the name of Nathan was in Lodi last week with a street car machine. Some one was in Stockton this week. I am working Tracy, wired you today asking for list of stockholders & especially Cal. & S. Francisco holders.

I believe I will do business with the Tracy bank, directors et al. I told them I had 35000 to sell & if I sold it all in their community the Co would permit one man to seat on the advisory board & see that everything is taken up legitimately. They are to have another special meeting at which my presence will be required at which time I must have stock-

holders list & statement. Show up cash & notes in one item.

Write me a personal letter and tell me you will do all in your power to help me get that 1000 machines I ask for, for my territory. Also say in a joking way that you never knew there were so many banks in the country, as the letters show which are coming in daily asking about machines. Also state that one of the directors stated at luncheon the other day that they are figuring to keep the wheels running 24 hrs a day 3- 8 hr shifts in order to supply the great demand which *I* know there is for our new born toy.

Also state that the other *two* agencies are almost through with the stock selling & if I want to let them have what I got to sell to let you know as they want it, but personally you wouldn't do it as it would mean that I would have to lay *ideal* for a month or two until the machines are ready.

I am feeling fine physically & seem to be sound mentally, its only once in a while I get bugs.

Yours mit lof

Gernert

P. S. I hocked my sparkler today in order to save myself from being knocked down, theres so many hold ups these days."

Whereupon the Government offered, and there was received in evidence without objection and marked as

Government's Exhibit 289 a letter written by the defendant LeMonn at Portland, Oregon, under date of March 2, 1912, to the defendant Gernert at Stockton, California. The following is a copy of said letter:

"March 2, 1912

Mr. O. E. Gernert,
Stockton, Calif.

My dear Gernert:

I have your favor of the 27th and have carefully noted contents of same, and beg to advise that Mr. Amsden has reported at this office this afternoon and is not leaving anyone working in California.

We are today sending you a partial list of stockholders in California, as the entire list was eight pages long, together with financial statement as shown by our books February 1, 1912.

We will be only too pleased to have a member on the Advisory Board from that section of California providing they sell \$35,000 worth of stock allotted to you, as then they would have a sufficient investment to take a deep personal interest in advising with us as to plans of manufacturing and selling.

You may count upon me using my personal influence in giving you all the possible support toward providing you with 1000 machines which you have requested for your territory. You would really be surprised at the number of unsolicited orders that are coming in from almost every quarter, and it has

been a very agreeable surprise to the writer, as I had no idea there were that many banks and paymasters in the country.

You may be interested to know that the Board of Directors have decided to have the factory work overtime and we are figuring on getting the factory on three shifts of eight hours each, which means that they will have to work twenty-four hours a day if the orders keep on coming, in order to supply the great demand, which we are assured for this new device, our Automatic Cashier.

Just a word to advise you that the other two fiscal agents have almost sold their entire allotment and want to know if we can supply them with another block which means, if we are to do this, that we get same from you and want you to advise us by return mail if you are willing to release any part of your block and turn it over to them. In fact, I think they would give you a small premium if you would do so. Just bear in mind that we are not asking you to do this as it would mean that you and your men would have to remain idle for at least thirty or sixty days until we could supply you with enough machines to keep your men busy.

It may interest you to know that a week ago I saw the first Standard Commercial Automatic Cashier demonstrated and in action and watched it work for a period of thirty minutes without it making a symbol of an error and I believe that this dem-

onstration proved one fact: That it is the first time in the history of the world that any machine ever made three automatic visible records of a transaction, two of which were permanent, one on the endless tape and the other on the check itself and these, together with the visible total which is always before you, constituted these three records. Besides these three records we had two others, one when the keys were depressed, and as you know remain down until the machine is operated, and the other the money which was paid from the machine automatically.

We have been very enthusiastic after this demonstration and are absolutely satisfied that these machines will revolutionize the present systems of handling money and prove to be one of the greatest of modern inventions.

Am glad to know that you are feeling yourself again and wishing you continued success, beg to remain,

Yours very truly,

SALES-MANAGER.

FML:E

Whereupon the Government offered in evidence a letter written by the defendant LeMonn to the defendant Gernert of date March 2, 1912, the letter having been written at Portland, Oregon, and addressed to the defendant Gernert at Stockton, California. It was marked as Government's Exhibit Number 294. The following is a copy of the letter.

“March 2, 1912

Mr. O. E. Gernert,
Stockton Hotel,
Stockton, Calif.

Dear Mr. Gernert:

Mr. Muraine has written to Mr. Menefee, stating the serious condition on account of no rain, which exists in and around Stockton and that they are going to work the factories around Stockton, and he also sends clippings of some paper to verify this drought of which he writes. This matter has been taken up with the writer and am giving you this information so that you may know just what is coming to headquarters and we are not answering his communication as we want you to have full charge of the campaign and to take the responsibility of success or failure upon yourself, as we might do more harm than good in attempting to aid you with letters from this office.

Don't let them get you on the run. Keep your head and your nerve and lead them instead of being influenced by anything that they had to say. At the same time, weigh carefully whether it is going to be to our best interest to continue a campaign there. If it looks like a two to one shot for failure, it might be well to plan to get into some territory where the chances are of success would be much greater. This however, can only be a suggestion that we are anxious at all times to plan with you for the best, but before you make this new move, inasmuch as it

would require additional financing, we of course would want you to take the matter up with us and have it definitely decided or agreed upon so that we may all be working harmoniously from beginning to end.

We want you to write us fully at least once a week as to the conditions, etc., so that we may know, first hand, from you how the men are feeling, what they are doing, etc., instead of learning these things from them direct and am sorry to say that it appears to the writer that you are starting without giving this matter the consideration that it merits as we must hear fully and at regular intervals from our fiscal agents who are in charge of such an important campaign. Change places with the writer and tell me how, if you were here, you would help me there with such meagre information at your command as has been supplied to us here in the office.

We are rather surprised that you did not reply to our wire of yesterday and can account for it only on the basis that you were not in Stockton to receive same, but we are in great hopes that you will be able to send us information that the boys have gotten started to a nice business by the close of this week.

Wishing you the very greatest success, we beg to remain,

Yours very truly,

FML:E

Sales-Mgr.

P.S. Kindly advise with the boys and find out what kind of telegrams or letters they think would aid them in closing business so that we may be able to send some at intervals of at least once a week, in order to close the largest possible business each and every week.

Whereupon the Government offered in evidence a letter written by the defendant LeMonn to the defendant Gernert of date March 23, 1912, the letter having been written at Portland, Oregon, and addressed to the defendant Gernert at Stockton, California. It was marked as Government's Exhibit Number 295. The following is a copy of the letter:

"March 23, 1912

Mr. O. E. Gernert,
Stockton Hotel,
Stockton, Calif.

My dear Gernert:

We received the following W U Day Letter of yesterday from you:

"F. M. LeMonn,

Advanced men as follows: Moore two fifty; Muraine ten five; Sewall one five; Lovelace fifty; Howe ninety five in addition to the above I have given Muraine ten and Sewall thirty five for this week. The money I requested was due last Saturday there are two weeks due today. I wired from Coalinga that there was no business closed. Now don't ask any more questions if you don't want to

continue the contract we three entered into you and Menefee wire me its off. You have my consent herewith I will stick and go it alone on my own stock as I am going to get some money. You men have it coming in from all sides. I was to be in on that deal but was passed up. You are making enough money to buy oil real estate, mining stocks, etc. and all I want to do is get myself out of debt. I have devoted two of the best years of my *left* on that proposition. Was willing to stand or go down with *and* and I feel I am somewhat responsible for your success. I am due for some money on this proposition and must have it not only to pay the loans I have made and put into this but *we* take care of my family. Now LeMonn if you want to call the contract off wire me personally two fifty wire answer.'

Our books show since February 10th that we have advanced to you as follows: Feb. 10—\$150, Feb. 21—\$250, Feb. 26—\$215, Feb. 27—\$40, and March 5—\$180, March 12—\$200 and March 23d—\$140; making a total of \$1175. Your telegram shows amounts advanced to men as follows: Moore—\$250; Muraine—\$105; Sewall \$105, Lovelace \$50; Howe—\$95 and in addition Muraine \$10 and Sewall \$35; making a total of \$650, after deducting the \$650 advanced to your men from \$1175 it shows that you have personally had \$525, or only \$125 less than all the men. This means that you personally have used up more than the amount we agreed to advance in the way of \$75 per week, as \$75 per week for six weeks would amount to \$450, notwithstanding

the fact that you have failed to give us a report from week to week as we have requested in the way of receipts from the men for advances you made them, as well as giving us a report at the end of each week whether you had business or not.

The above telegram from you is certainly the most injurious thing you could possibly send by wire, as there is only one way where you could do us more harm and that would be to publish it in the newspapers and it should be unnecessary for us to caution you that under no circumstances should you ever resort to such methods unless you want us to believe that you are intentionally trying to injure both the officers personally and the Company as well. If there are any more outbreaks like this, I will take a personal delight in taking the next train to you and will talk with you face to face instead of wasting any time in writing or wiring. If you think you can indulge in any such injurious methods as this, to say nothing of it being wrong and unfriendly, you certainly are very much mistaken.

You might know that we would not be willing to have you continue a campaign to your own personal profit after we had given you the assistance and advanced you money, without our having some interest in the matter and it seems to us that if you will only attend to the little things which you so apparently ignore, in the way of giving us reports that we requested and have every right, from a business point of view, to have, as it would save a lot of unpleasantness.

Don't waste any time in stating that you have devoted two of the best years of your life in this proposition as the writer has some conception as to how much time you have put in, along other lines outside of business and I think that you are rather offensive when you call my attention to the fact that you have been somewhat responsible for my success, when you fail to take into consideration what the writer has paid you outside of your regular earnings as compensation for such service rendered. I am afraid you are going to spoil your future success by assuming too much on the past favors and the value of them that you have rendered the writer.

At the same time I want to assure you that I am grateful for all the past favors that you have rendered, but it is not the time to stop work and begin fussing over the past but it is time that we all get together and keep together in working for the best interests of the Company and all concerned, as divided you know what the result will be.

I am in hopes that you will read this letter in the spirit in which it is intended and that you will get it out of your mind that we are trying to fuss you, but we must insist that we get a substantial return for the money spent or at least, have a complete explanation and statement regarding advances, etc. If there

We have wired you twice regarding the Tracy deal but in each telegram you have failed to report

and you can readily understand that this doesn't look like good business to us. We believe that it is up to you to give us some explanation as to why you have failed to answer this specific question, for we have a right to know and will take the proper steps to protect our interests at all times.

In conclusion, upon receipt of this letter we want to ask you to write us fully as to the work to date and as to what each man has done or what you think he can do so that we can change the campaign, quit it entirely or plan it along the lines that we are willing to continue expending money on same.

Mr. Menefee leaves today and I want you to put your shoulder to the wheel and co-operate with the writer in every possible manner in order to make the campaign, during his absence every success, and rest assured that if it is your pleasure to give us some evidence that you are still with us in the way of working toward the greatest success of this Company you will have no need to fear but that you will be treated squarely, fairly and even generously in the future as you have been in the past, and don't get peeved because we are watching the money end of it as there never was a time that we were needing cash to a greater extent than now, for we have larger bills than ever for February and March, in the way of paying for machinery, etc., and must watch every point.

Let us all work together and see if we can't give Mr. Menefee a substantial token of our apprecia-

tion of him in the way of a better business than we have secured at any time since the stock has been advanced.

Hoping everything will come out right and that our relations will continue pleasant and profitable for a long time to come, we beg to remain,

Yours very truly,

FML:E

Sales-Mgr.

Whereupon the Government offered in evidence a letter written by the defendant Menefee to the defendant Gernert of date March 12, 1912, the letter having been written at Portland, Oregon, and addressed to the defendant Gernert at Stockton, California. It was marked as Government's Exhibit 440. The following is a copy of the letter:

"March 12, 1912.

Mr. O. E. Gernert,
Stockton Hotel,
Stockton, Calif.

My dear Gernert:

Your letter of the 10th instant; also telegram same date received. I wired you nightletter last night with reference to meeting Campbell Friday, but from your letter and the telegram from Mr. LeMonn think it perhaps unadvisable to not meet your partied for the 16th, and if that is the arrangement, will try to have Hackney there with the machine.

Campbell wanted you to go to Coalinga as he is there on some private business and thought with your

assistance and the machine he could start a pool or something of that kind and pull off a good "stunt." Campbell, as you know, is a fellow who really does things and unless you have mighty good prospects there you are, it would be a good thing if you would tie up with his proposition as he would not want to stay there long, but would merely try to get it started and come back to be here while I am gone. Mr. LeMonn's trip and Mr. Campbell's absence makes it necessary for me to postpone my trip for another week, and considering they are both down in that country, have changed my plans and will go directly East.

In regard to the Seattle land, will say that I have on a cash deal for it and will know in the next four or five days and if it does not go through, will make the stock trade at \$12.50 per share which we talked about when you were here. Of course it would not be policy for us to turn down a chance to get some cash. Am perfectly willing to trade you the St. Johns property, but thought it best to wait until you come up so we could be together and make the deal. The St. Johns property is rented to a good tenant at \$14.00 per month.

We have had things double up on us pretty heavily here in the money way in the past month. Collections are coming in fairly good and also some little cash business, but have had to squirm pretty lively to keep the pot boiling. If my remittance comes the 15th, which I feel is pretty nearly a certainty,

it will then ease up the whole situation, as it amounts to enough to be worth while.

Bonnewell has a man in from Wyoming and closed a deal with him last night for \$6000 at \$30 per share, a small amount in cash and the balance on very short time paper, which is gilt edged. It is also a load to open the territory as the party is a man of wealth and influence and goes to work for Bonnewell on a 5% commission, under contract to produce \$10,000 in cash by May 1st and \$14,000 more by July 1st in addition to the subscription he made. I think it will mean from \$30,000 to \$60,000 worth of business as it is certainly the right connection to make.

Our first machine is assembled today, tried out and found to be satisfactory in every respect. It is beyond question so superior to our demonstrating machines that they are a mere joke. The first lot of commercial machines is also well under way. Die making has progressed very satisfactorily and we expect to get out a bunch of machines by the last of April at the outside, and this will be immediately followed by a larger number, and from the looks of things at the factory, by July 1st we will be in full swing delivering machines to the trade right along and practically on a self supporting basis so far as the factory is concerned. As you know, Mr. Conley advises that he can deliver more than \$500,000 worth of machines by the close of this year.

Now, I just have one kick to register against you and it is a good hard one. It is that you don't write us, keep us advised as to what is happening, what you expect to do, etc. Surely we ought to have a good long letter going into detail not less than once a week. It is mighty uncomfortable sitting here and not knowing for two or three weeks at a time very much about what you are doing or expecting to do and it leaves us in a very poor situation to calculate or plan to help you. Now, you know I do not kick for the sake of kicking and do not intent anything as being offensive, but I am really serious about this. We ought to hear from you oftener and fuller than we do. That has always been the worst criticism I have had of you and your work in the field—the lack of knowledge as to what is going on.

Am wiring you today as follows: Your meeting indicates not advisable to meet Campbell. Perhaps would do to meet him Monday or Tuesday. Arranging send Hackney with Computer Wednesday evening. Wire us where he shall meet you.

If you have not already wired or written me on receipt of nightletter and above telegram, do so at once so I can be in touch with the situation and know what to do.

I think the Campbell proposition might mean lots to you, so if after your meeting Saturday the prospects are not good, would advise getting in im-

mediate touch with him and connecting with him early the coming week, taking Hackney and the Computer.

With best regards, I am

Yours faithfully,

FM: HG

President."

There was no evidence offered by any party in the case that the defendant Gernert exhibited (Government's Exhibit 289) to any person or that he sold any stock in California to any person whomsoever. All of the defendants, including the defendant Gernert and the defendant Bilyeu admitted that each, every and all of said letters were written by said respective defendants to said respective defendants and transmitted by and to them through the agency of the United States mails.

By the stenographers who were in the employ of the United States Cashier Company during the time that all of the letters and telegrams mentioned in this bill of exceptions were written and sent, it was proven that it was the habit and custom of the officers of the United States Cashier Company, particularly of the defendants Lemonn and Menefee, to handle the matter of the correspondence in the following manner: A letter would be dictated to the stenographer, who would write the same, whereupon the original would be signed by the writer of the letter and the same would then be deposited in the mail for mailing and delivery, as a part of the custom of the office. The stenographer would then upon the lower left-hand corner of the letter or other instrument in writing, and place the initials of the author of the let-

ter, together with the initials of the stenographer who wrote the letter. A carbon copy, which would be an exact copy of the letter without the signature would then be placed in the files of the company as a part of its records. Telegrams were prepared in the same way with the exception that attached to telegrams of which there were to be a number of the same telegram to be transmitted to the several agents there would be a letter to the telegraph company authorizing and directing said company to transmit said telegrams and to charge the same to the account of the United States Cashier Company. Mr. House, expert accountant for the Department of Justice, testified that the defendant Menefee had voluntarily delivered to him before the indictment all of these letters and telegrams and that the witness House had thereupon written upon each of these letters and telegrams his initials so as to be able to identify them. House further testified that at the time the defendant Menefee turned these letters and telegrams over to him, that Menefee then voluntarily told him that these letters and telegrams constituted and were the correspondence of the United States Cashier Company. There was no proof offered by either side which would prove or tend to prove that any of the said letters or telegrams were not genuine. There was no evidence offered by either side tending to prove that the defendant Gernert received any of said telegrams or requested that any of said telegrams be sent or that he was at the time the telegrams were sent at any of the places at which they were sent, or that he acted upon any of said telegrams hereinafter set forth. It was further testified to

by the stenographers that it was the custom of the office and especially of Menefee and LeMonn in writing letters and sending telegrams to salesmen, that but one carbon copy of the letter would be retained by the office, but that to the said carbon copy so retained there would be by the stenographer attached a list of all of the agents to whom the letter was sent. With this proof of identification as to each, every and all of the said exhibits, the following Government Exhibits were introduced and read in evidence:

Government's Exhibit 139: telegram to salesmen signed by United States Cashier Company under date of September 14, 1911, with list of nineteen agents attached, including the name of O. E. Gernert, C/o O. L. Hopson, Woodburn, Oregon. The following is a copy of said telegram:

"September 14, 1911.

Only a small block of stock remaining at fifteen. Close business daily as rise to twenty dollars per share may be announced any day.

Charge.

U. S. Cashier Co.

Government's Exhibit 146: telegram from United States Cashier Company to agents, under date of October 19, 1911, with list of twenty-eight agents attached, including the name of O. E. Gernert. The following is a copy of the telegram.

"October 19, 1911

Close business daily each day. Only small block remaining at fifteen dollars. Positive advance to

twenty or twenty-five dollars within a few days and may not advise you again before advance takes place.

Charge

United States Cashier Company."

Government's Exhibit 146E: letter written by Le-Monn to Gernert under date of October 19, 1911. The following is a copy of the letter.

"October 19, 1911

Mr. O. E. Gernert,
266 $\frac{1}{2}$ Stark Street,
Portland, Oregon.

My Dear Gernert:

We want to congratulate you on the excellent business you have been securing for the past few days and to advise you to close all your prospects Friday and Saturday as the advance from \$15 to \$20 may go into effect Monday without further notice.

Report sales promptly so that you will not get left by the block being over-sold.

Yours very truly,

UNITED STATES CASHIER CO.
FML:HE Sales-Mgr."

Government's Exhibit 176: telegram under date of March 7, 1912, from United States Cashier Company to agents, with list of nineteen agents attached, including the name of O. E. Gernert, Stockton Hotel, Stock-

ton, California. The following is a copy of the telegram.

“March 7, 1912

Dont oversell one hundred shares without permission by wire as thirty dollar allotment almost gone and advance to fifty likely take place at early date without further notice.

Charge

United States Cashier Company.”

Government's Exhibit 188: a telegram from United States Cashier Company to agents, under date of May 1, 1912, with list of fifteen agents attached, including the name of O. E. Gernert 432 Pioneer Building, Seattle, Washington. The following is a copy of the telegram.

“May 1, 1912

President and General Manager Frank Meneff, just returned from four weeks eastern trip of investigation and inspection and the management today have decided the next advance will be twenty dollars per share over the present price. As there is but a small allotment remaining of resales at thirty dollars you must close business daily as cant guarantee to make any deliveries at that price after Saturday next. Dont oversell one hundred shares without wiring for permission.

Charge

United States Cashier Company.”

FML:E

Government's Exhibit 187: a telegram under date of April 24, 1912, from the United States Cashier Company to agents, with list attached including the name of O. E. Gernert, 432 Pioneer Building, Seattle, Washington. The following is a copy of the telegram.

"Portland, Ore., Apr. 24, 1912.

Mr. Menefee President returns Saturday date advance to fifty will then be decided close all options and prospects offered at thirty as cant guarantee at this time accept subscriptions at thirty date later than Saturday twenty seventh. Mail all subscriptions and collections without fail Saturday to reach here Monday morning.

Charge.

United States Cashier Company."

Government's Exhibit 182: a telegram under date of April 11, 1912, from the United States Cashier Company to agents, with list of thirteen agents attached, including the name of O. E. Gernert, General Delivery, Seattle, Washington. The following is a copy of the telegram.

"April 11, 1912

Dont give any options at thirty dollars after Saturday thirteenth as allotment nearly sold out. Next advance positively to fifty dollars which will go into effect within a few days.

Charge

United States Cashier Co."

FML:E

Government's Exhibit 174: a telegram under date of February 28, 1912, from United States Cashier Company to agents, with list attached of twenty-one agents, including the name of O. E. Gernert, Stockton Hotel, Stockton, California. The following is a copy of the telegram.

"Feb. 28, 1912

As previously advised in our letters and telegrams stock will be advanced at early date to fifty dollars per share as the small block allotted at thirty is going fast. Unsolicited orders for machines are coming in from every direction. First machine will leave factory in few days.

Charge United States Cashier Co."

Government's Exhibit 166: telegram under date of January 16, 1912, from United States Cashier Company to agents, with list attached including the name of O. E. Gernert, Astoria Hotel, Los Angeles, California. The telegram is as follows:

"Portland, Ore. Jan. 16, 1912.

Allotment twenty dollar stock nearly exhausted and expect to raise price to thirty January twenty-second and positively no orders will be received after February first except at thirty. This for your confidential information and positive. Don't depend on later than January twenty-second.

Charge. United States Cashier Co."

Government's Exhibit 129: telegram under date of July 3, 1911, to agents residing in Seattle, Washington,

Spokane, Washington, and Lewiston, Montana, but not including O. E. Gernert. The following is a copy of the telegram.

“July 3, 1911

You are hereby authorized to sell two hundred fifty shares at twelve fifty providing applications are mailed to us by July fifth bearing date not later than July first as this block was allotted to San Francisco agency for which settlement was not received.

Charge.

United States Cashier Co.”

Government's Exhibit 129B: The same telegram under date of July 3, 1911, from the United States Cashier Company to agents, including twelve agents in Oregon, Washington, and Idaho, and including the name of O. E. Gernert, Commercial Hotel, North Yakima, Washington; and in reference to the last mentioned two telegrams, Government's Exhibits 129 and 129B, the Government by similar proof proved that on July 3, 1911, the United States Cashier Company had telegraphed their San Francisco agents as follows:

“July 3, 1911

You are hereby authorized to sell Two Hundred Fifty shares at twelve fifty providing applications are mailed to us by July fifth bearing date not later than July first, as this block was allotted to Montana agency for which settlement was not received.”

Thereupon the Government called to the witness stand Myrtle Meadows, who testified among other

things that she was a stenographer in the employ of the United States Cashier Company during the latter part of the year 1911 and the early part of 1912, and the witness testified as to her employers customs in handling their office work as is shown on pages 58 and 59 of this bill of exceptions.

Whereupon the following proceedings were had:

MR. REAMS: I am going to ask you to examine the carbon copy of the letter of date of February 10, 1912, and after you have examined it carefully tell the jury if you know who dictated the letter and to whom it was dictated.

A. I believe it was dictated by Frank Menefee and written by myself.

MR. REAMS: The Government will offer in evidence the letter identified by the witness and dated February 10, 1912, marked Government's Exhibit 293.

MR. MAGUIRE: The defendant Gernert objects to this because there is no proof showing he received it or accepted it, or proof that it was a contract entered into. I may state for the information of the Disrtict Attorney that this was not entered into and for that reason he objects to it.

MR. REAMS: I do not know if the Court feels whether or not this cotract was ever entered into. I do know that the proof shows that under the admission that the carbon copy came from the files of the company and it has been testified to by the witness that she believes

it was dictated to her by Mr. Menefee and in the regular course of business the original would have been mailed.

THE COURT: It will be admitted subject to the explanation of the defendant.

The following is a copy of the letter:

“Portland, Oregon, February 10th, 1912.

Mr. O. E. Gernert,
Portland, Oregon.

Dear Sir:

In reference to our understanding in regard to your selling stock in California territory, will say that we will make you the following proposition: You are to work in the territory from San Francisco south toward Los Angeles, keeping at a distance from said latter place, so as not to interfere with the territory or work of our Agent there, and you are to have working under you such men as you may mutually arrange for, and after the first advancement to any of the men working under you, no further advancement shall be made to any of them, except through you.

All men working under you shall receive a commission of fifteen (15%) per cent, providing the business done by them shall not equal or exceed the sum of One Thousand Five Hundred (\$1,500.00) Dollars per month; twenty (20%) per cent if the business done by them shall exceed One Thousand Five Hundred (\$1,500.00) Dollars per month and

shall not reach Three Thousand (\$3,000.00) Dollars; and twenty-five (25%) per cent if the business done by them in any one month shall exceed the sum of Three Thousand (\$3,000.00) Dollars; these commissions to be allowed and rated only on cash business done by each of your men respectively.

On all the business done by your men where settlement is made in paper, and either notes or contracts taken, only a fifteen (15%) per cent commission shall be allowed, and no paper shall be taken to run longer than ninety (90) days, provided where settlement is made for purchases of stock by note, if you or your agent shall succeed in discounting said note without recourse, so that the proceeds shall be received by us within ten (10) days after the close of the month in which the sale of the stock is made for which said note is taken in settlement, same shall be credited back as cash business for the month in which the subscription was taken. The commissions on settlements made by note or contract or in any manner other than cash, shall only become due and payable when the money is received by us for the sale or collection of said note or contract.

The above terms shall apply to any business done by you personally without the aid or assistance of an Agent.

It is understood and agreed that you shall be entitled to receive an overhead commission on all business done by you or your Agents of five (5%) per

cent, and your commission shall be due and payable as that of the Agents, or in other words, on cash received, or on notes negotiated without recourse or collected.

We will advance to you for your personal expenses, the sum of Twenty-five (\$25.00) Dollars per week, and pay you in addition to the above commission, a salary of Fifty (\$50.00) Dollars per week, it being understood that the Twenty-five (\$25.00) Dollars per week expense money shall be returned to us or deducted from your commission as earned.

No settlement shall be made by you or any of your Agents on cash business turned in to you or through you to us, except the minimum commission of fifteen (15%) per cent on cash received, which you may retain and pay to the agents as the cash is received by you, and the bonuses or extra commissions, if any shall accrue to any agent, shall only be settled ten (10) days after the close of the month, when the volume of business done by each person working under you, shall be finally ascertained.

It is understood that in all sales made by you or your organization, you shall have the right to turn your own personal stock for one-fourth ($\frac{1}{4}$) of all such sales; that the turning over by you of the stock to the amount of one-fourth ($\frac{1}{4}$) of all of the net proceeds, less your commissions, agents' commissions, and other expenses incurred in the selling of the stock which you shall dispose of.

In consideration of allowing you to dispose of one-fourth ($\frac{1}{4}$) of the stock handled by you, from your personal stock, you are to bear one-fourth ($\frac{1}{4}$) of the expense of your own salary, sales commissions, and other expenses, it being understood that our agreement to pay to you the salary mentioned, and advance to you the money as above stated, is to be considered only as a loan to the extent of the advancement of the Twenty-five (\$25.00) Dollars per week, and one-fourth ($\frac{1}{4}$) of your salary.

With reference to all notes taken by you, it is understood that you shall, where you leave same with a local bank for collection, take a receipt from said bank, particularly describing the note, the returns and commissions to be allowed for the collection, and so deposit the same that the proceeds will be at once accounted for and remitted to the undersigned by said bank.

Yours faithfully."

No. 3

FM:MM

To which action of the Court the defendant Gernert was duly allowed an exception.

Whereupon Lew Paramore, a witness called on behalf of the Government, being first duly sworn, testified as follows: I live at Snohomish, Washington, and have been a druggist in that city where I have lived since March, 1890. I am slightly acquainted with the defend-

ant O. E. Gernert. I first met Gernert in company with others at the Commercial Hotel in the city of Snohomish, and afterwards in my home. I bought some stock on the representation of what it was to do, and I don't know as I can go to work and describe all the machine was to do. It was a coin-paying machine, and had something to do with paying checks, making a record and paying checks, an adding machine, it could do pretty near everything but talk. I bought fifty shares at twenty dollars per share on December 2, 1911, and gave a note bearing five per cent interest to run for five years. I gave the note to the defendant Gernert for the company. The note has not yet been paid, but I paid the interest on it at the First National Bank of Snohomish, Washington, for two or three years. Mr. Gernert claimed to be representing the United States Cashier Company as assistant sales manager. He represented that the stock that I bought would be treasury stock of the United States Cashier Company, and that stock was being sold at that time to pay off what little indebtedness the company then owed on the patents. I think this indebtedness was somethnig like \$50,000 as near as I can remember, but I won't be positive about that, because I did not charge my memory with the amount of it. Mr. Gernert at that time said that the company owned all the patents to its machines. The fact of the business is I bought this stock on the representation of Mr. Gernert and what he said at that time particularly, which I could not be called upon to remember. I am a man past seventy-five years of age, and my memory is not as good as it was ten years ago.

I could not tell the story unless questions are asked me which bring the facts back to my memory. Mr. Gernert said that dividends would be paid within the coming year, and that he had not any doubt but what the dividends would reimburse me for the amount that I was then paying for the stock. He made the statement to me as near as I can remember that the railroad companies were now, at that time, paying twenty-five cents a day for the machines that they were using; but the machine that this company was making, they were going to put them in the streetcars at fifteen cents a day, and that the profit accruing from the rent of these machines would pay the running expenses of the company every year. I think if I remember right, that he expected to derive \$150,000 a year from the rent of these machines. Mr. Gernert and Mr. Muraine were there at that time with another man. There were three of them together, but I do not know who the other man was. I had no business with him. I have never received any dividend upon my stock, not even the scratch of a pen from them.

Cross examination by Mr. Maguire:

I bought this stock on December 2, 1911, at Snohomish, Washington; the agents had a machine there with them at that time. I could not swear to the machine, for I did not pay any very particular attention to it. Mr. Gernert demonstrated the machine to me. It would pay any amount of cash up to a certain amount. I cannot explain it as he did only in regard to the checks. You put a check in there and you paid the money and

it would show. I think it showed on the check the amount of money that would pay on it, and the balance was left. I did not charge my memory particularly with them. They were not the things I was looking at. I don't know who was the first man I spoke to about it. I don't know whether Mr. Gernert was or not. I think very likely it was, but I would not be positive as to that. Mr. Gernert was present at all of the conversation. Mr. Gernert is the man that I done the business with, and on his statements that I bought the stock. He is the man. I recollect that Mr. Gernert came out to my house. I think that Gernert, myself and Muraine walked up there together, I think if I remember right. Mr. Gernert is the man who took my subscription. Mr. Gernert made out the note in his own handwriting, and that defendant's "Exhibit T" is a copy of the note which he gave to the defendant Gernert.

DEFENDANT'S EXHIBIT T.

\$1,000.00.

December 2nd, 1911.

Five years after date, without grace, I promise to pay to the order of O. E. Gernert, One Thousand Dollars for value received, with interest from date at the rate of Six per cent per annum until paid, principal and interest payable in United States Gold Coin, at Snohomish, Washington. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due December 2nd, 1916.

Whereupon the witness testified as follows:

Q. Now, I will ask you to examine this pink slip here and state whether or not the signature "Lew Paramore" appearing in that is your signature.

A. Yes, that is right: yes, that is my signature on there, yes.

Q. Now, the words "Lew Paramore" is your signature, and the word "Snohomish" and the abbreviation "Wash." for Washington is all in your handwriting?

A. Yes.

Q. And it was signed by you on the date that this bears was it not?

A. Yes.

Q. December 2, 1911?

A. Yes.

Q. And now where was that executed, Mr. Paramore?

A. It was executed at my home.

Q. At your home?

A. Yes.

Q. Now was Mr. Gernert there—whereabouts in your home? What room, do you recall?

A. Well, it was in my regular sitting room where I do my sitting, reading and writing, everything of that kind.

Q. Beg pardon.

A. Oh, it was a room where I do my sitting and writing and reading, etc.

Q. Who was present at the time you signed this subscription blank?

A. I think very likely Mr. Muraine was there.

Q. Was anybody else there?

A. Not that I recall now.

Q. Not that you recall?

A. No.

Q. Mr. Gernert was not there?

A. Mr. Gernert was there, sure.

Q. Mr. Gernert was in the room at the time this was signed?

A. Sure, certain he was.

Q. You are clear and positive about that?

A. They were both there as I remember.

Q. Now, isn't it a matter of fact that Mr. Gernert had left you and Mr. Muraine together at the time that this subscription was signed by you? Five years ago is a long time to remember.

A. I don't think so.

Q. You don't recall whether he was or not?

A. I think were both there, and they both went away together.

Q. What I mean to say, was Mr. Gernert there in the room at the time you signed this contract or subscription?

A. Yes.

Q. You are clear about that. We will offer it in evidence.

MR. REAMES: No objection.

Marked Defendant's Exhibit "U."

"Sub. No.—— No. of shares 50. Amount \$1000.00

I hereby purchase from O. E. Gernert, Sales Agent——shares of fully paid and non assessable stock of the United States Cashier Co., for which I agree to pay twenty dollars (\$20.00) per share. Payment to be made on or before five years. I understand that the stock is not transferable for a period four months from date of issue.

Signature: Lew Paramore

Occupation——City Snohomish, Wash.

Date Dec. 2nd, 1911

Rec'd payment on above note \$1000.00

Rec'd payment on above———

O. E. GERNERT, Sales Agent
per P. E. Muraine, Rep."

Q. Now, did they have more than that one machine there, Mr. Paramore, in Snohomish, that you saw?

A. I don't remember but one.

Q. But the one.

A. I don't remember.

Q. That was at least the only one you saw demonstrated?

A. The only one I remember anything about, yes.

Q. Well, of course if there had been one there your attention would have been attracted to it. If there were any representations relative to any ma-

chine they had there, you would recollect that circumstance?

A. Very likely I would remember. I don't think but the one machine.

Q. That machine you saw had what attachment?

A. Oh, I don't remember what all the attachments were on that, at all. I didn't buy it; didn't buy the machine. I was buying the representations of what he told me the machine would do.

Q. And you were there looking at the machine and saw that it did do the things that he said?

A. No, I don't know that it done the things that he said. I bought the machine upon what he told me the machine would do, and what the company was going to do. That is what I bought. I didn't care anything about the machine.

Q. What else did he tell you? Mr. Gernert, I want. That is what I want you to keep clear. I want you to distinguish in your own mind what Mr. Gernert told you, and what some one else, Mr. Muraine or this other man you don't recollect. What did Mr. Gernert tell you with respect to these machines and what did he tell you about the whole proposition? I want your recollection about it.

A. Well, now I can't go over that whole conversation as he told it. He went on and told me what the machine would do—what all it was going to do.

Q. That is what I want to know. What was it he told you?

A. Well, I couldn't call it to mind, anything more than it would pay coin. It was an adding machine and it had some—make some checks—in regard to paying checks so there would be no mistake about a thing of that kind. If you put a check in for \$25.00 and drew \$15.00 of it, the check would show how much was drawn and how much was not drawn, and he went on and demonstrated that adding machine, what advantage it had over other machines; that if a mistake was made, how easy it was to correct it and—Oh, I don't remember the whole thing.

Q. Well, what else did he tell you, not only about that machine, but we want to know what representations, now, Mr. Gernert made to you at that time, keeping in mind to keep separate what Mr. Gernert said, and Mr. Muraine told you or anybody else told you?

A. Well, now you are asking a pretty difficult thing for a man to do, for over four or five years ago.

Q. I know that, Mr. Paramore.

A. Yes.

Q. And that is why I want you to be particularly sure of what Mr. Gernert told you.

A. Mr. Gernert was the man I done the business with. Don't make any difference what this other man said; he is the man I done the business with.

Q. We are not going to have an argument.

A. I know what I am talking about.

Q. I don't question that.

A. Don't make any difference about what the other man said. It was his representations I bought the stock.

Q. So that I understand.

A. That is what I am going to tell you; a great many things and all down in black and white; my letters been right here. I heard a letter read here yesterday—just a statement I heard, repeating all that I heard.

Q. Just tell the jury now.

A. I can't do it, I can't recall; a man don't charge his memory with that. I am a man 75 years old. I can't remember what occurred 50 years ago.

Q. I am not criticizing.

A. You are asking impossibilities; that is what you are doing.

Q. Then you haven't any recollection of what Mr. Gernert represented to you at this time, with reference to these matters?

A. Well, I told you as near as I could recall all he told.

Q. You told Mr. Reames, yes; now I want you to tell me.

A. I told you; I told you the same thing as what I told Mr. Reames.

Q. You have just started in; you told us what Mr. Gernert told you the machine would do; now you told the District Attorney, after a few questions, about a good many other things. What I

want and what the jury is entitled to is that whole conversation that you had with Mr. Gernert.

A. You are asking impossibilities; that is all there is to it.

Q. You can't remember what the conversation was?

A. I can't remember what every word of the conversation was.

Q. I am not asking you that; the substance of the conversation.

A. Well, I told you he represented the machine, a paying machine, was an adding machine and it would—would correct errors, and it would show the checks, what amounts had been paid on it, and what was still due on the check, and I don't remember how many more things he did tell me. It went pretty near but couldn't talk; that is about all; pity it couldn't.

Q. Now, his entire conversation than was limited as to what this machine would do?

A. Yes, sir.

Q. And that is all the conversation that you had with Mr. Gernert—was upon that particular subject?

A. Why, I don't remember having any other conversation with him except that—regarding the business I transacted with him.

Q. That is what I want. I want the entire conversation, what you remember of it. Of course, I am not asking—

A. Haven't I told you once or twice?

Q. Yes.

A. Well, then what are you doing then? What are you asking me those things over and over for?

Q. Don't get the idea, Mr. Paramore, I am criticizing you.

A. Don't try to make a fool of yourself or me either. I am not used to this kind of business and you are trying to make a fool of me, and you are not going to do it.

Q. Well, I make myself as clear to you—

A. You can't do it, I don't think.

Q. Perhaps not; that may be your fault and may be mine. I have been asking you to tell the jury, in response to my question what Mr. Gernert told you in respect to this machine, and what the machine would do. Now, what I want is what other statements Mr. Gernert made with reference to this stock in the company. That is all I am trying to get; you have told us only what he told about the machine. I want to know everything else.

A. He told me I was buying treasury stock, which I didn't have. I didn't receive that kind.

Q. Did he tell you it was treasury stock? Did you receive stock of the company?

A. Why, yes, I guess so.

Q. You guess so?

A. Yes.

Q. You got a stock certificate, didn't you?

A. I got something of that kind, have it home there. Yes, but it ain't the stock—not the treasury stock, remember, the kind that I bought.

Q. Does the stock certificate show what stock it was?

A. Shows stock of the United States Cashier Company.

Q. Yes. When did you find out it wasn't treasury stock?

A. Found it out since I been here in this town.

Redirect examination by Mr. Reames.

Well, the note that I gave has not as yet been paid by me; it is secured by a mortgage upon my property and the mortgage still remains as a lien upon my property.

Whereupon Hiram S. House, recalled by the Government, testified as follows:

The books and records of the United States Cashier Company show that the witness Mr. Paramore received certificate of stock numbered 2729 of date December 6, 1911, for fifty shares. The stub of the certificate numbered 2702 which stood in the name of Frank Menefee. None of this money went into the treasury of the company in payment for this stock. The company received no benefit from this transaction.

Cross examination by Mr. Maguire.

"This certificate 2702 from which Mr. Paramore's stock was transferred was originally issued to Mr. Overlin as part of his salary. Mr. Overlin was developing the currency paying machine at that time for the company, and this stock, consist-

ing of 480 shares, was given as one-half of his salary from February, 1911, to February, 1912, the company having entered into a contract with Overlin to pay him \$800.00 per month, \$400.00 in cash and \$400.00 in stock. The certificate was issued to him in payment of that contract; that eight or ten months before the company had received value at the time the stock was originally issued."

The company paid no agent's commission on the transaction but during the month of December, 1911, the month in which the stock was purchased, Mr. Gernert received \$300 from the company as salary and expense. That was for his salary and expenses for five weeks. The correct amount of the credit is \$375, being his salary and expenses from November 25 to December 30, 1911, approximately five weeks. This was the last credit made to Mr. Gernert's account on the books on account of salary and expenses. He had some credits for commission after that.

John W. Zufall, a witness called on behalf of the Government, being first duly sworn, testified as follows.

Direct examination by Mr. Reames.

I live at Wenatchee, Washington, have lived there since March 12, 1910; am engaged in the pool room and confectionery business. I purchased some stock of the United States Cashier Company about the middle of November, 1911. I purchased ten shares from W. H. Bilyeu, an agent of the company. Purchase was made on November 18, 1911. I bought ten shares at

twenty dollars per share. I paid one hundred dollars cash, and in about ten days I paid fifty dollars more and gave a note for the other fifty. I identify Government's Exhibit Number 287 as the note given by me.

Whereupon the Government offered in evidence promissory note of date December 9, 1911, for fifty dollars, executed at Wenatchee, Washington, by the witness Zufall, due sixty days after date and payable to the order of O. E. Gernert at the Farmers and Merchants Bank of Wenatchee, Washington, the note being indorsed as having been paid on February 1, 1912.

Witness continuing:

I did not have the money to pay cash at the time I saw Mr. Gernert and so I gave him a note. I never saw Mr. Gernert until after the sale of the stock had been made and Mr. Gernert came to make the collection. I did not have any talk with Mr. Gernert particularly, any more than I was informed that he would be there and would take the note. In the first place when I bought the stock I paid one hundred dollars down and I did not have any more to pay, and after the first month when I drew my salary, you see, I could pay fifty dollars more, and I have a note for the other fifty, and Mr. Gernert was to be there sometime after the first of the month, and I would give him a note. I delivered the note to Mr. Gernert, in the Farmers and Merchants Bank, where the note was written out, and dated by Mr. Gernert, all of the writing in the note being in the handwriting of Mr. Gernert. I paid the note on the day of its maturity. When the transaction was closed,

I gave fifty dollars in cash to Mr. Gernert and gave him the note for fifty dollars. That he had no talk with Mr. Gernert at that time, or knew what Mr. Gernert was doing other than that Mr. Gernert was representing one of the firm, one of the company. Mr. Gernert said that he was representing the United States Cashier Company.

Whereupon G. H. Moore, a witness called on behalf of the Government, being first duly sworn, testified as follows.

Direct examination by Mr. Reames.

I live at Centralia, Washington, and have lived there since February, 1912. I formerly lived at Leavenworth, Washington; lived there between 1908 and 1912 and was engaged in the cigar business. I know Mr. O. E. Gernert by sight, and I know Mr. P. E. Muraine. I bought some stock of the United States Cashier Company in Leavenworth in December, 1911. I bought the stock from Mr. Muraine; Mr. Gernert was there at the time I bought the stock. Mr. Muraine, Mr. Gernert, and two others—I don't know who they were by name—came into my place and asked if they could display the machine there. I told them they could, and they went around town getting people to bring them up there, and showing them the machines—bankers, etc.—and I went so far as to introduce people to them that came in, which they sold some stock to. Mr. Gernert would explain it more than any of the rest of them while he was there—he was in and out—telling what the machine would do, etc., and what they had done with it,

and I got very greatly enthused with it myself and bought ten shares. I paid twenty dollars per share, by giving my note for ninety days. I gave a note to Mr. Muraine.

Q. Has the note been paid? What, if anything, was said to you while Mr. Gernert was there about what stock you were going to get?

A. Nothing whatever that I know of.

Q. That is, about what was to be done with the money for the sale of the stock?

A. Oh, it was to build the factory which they had started, equip it with machinery to go ahead and make the machines.

Q. Now, about how many people were sold stock in the town—in that town through your cigar store there?

A. Well, was Mr. Scott bought \$500.00 worth, and a Mr. Decker bought some there; others. I couldn't tell you. I don't know who else bought it.

Q. Were the same representations made to these other people as were made to you?

Mr. Maguire: Just a minute; you mean by Mr. Gernert.

Q. Either by Mr. Gernert or at a time when Mr. Gernert was there.

A. I heard the representations made all of them; yes, sir. It wasn't made to me; made to them and I was listening.

Q. And either by Mr. Gernert or at times when he was there?

A. Yes sir.

Witness continuing:

They promised me \$40 for the use of my place while they had the machine in there, and when they went away they said "How are we going to send you \$40.00"? I said, "Well, send two shares," but I didn't get the two shares or the \$40.00, and as time went on and the \$40.00 didn't come, I paid no attention to the note. I wrote them several letters, I think; two if not more. I didn't pay the note I gave for the stock.

Cross examination by Mr. Maguire.

Mr. Gernert and two others made the arrangement for putting the machine in there for demonstrating purposes. They done the talking, Mr. Gernert done most of the talking, and Mr. Muraine. There were four of them there. I made the arrangements with Mr. Muraine and Mr. Muraine and Mr. Gernert both spoke of it. They just put the machine in there to display it. I had no objection to it. I identify the machine as the computing machine. I heard them make representations about the machine that they had there, and after they had made the representations they would show them how it worked a good many times, and the machine did just what they said it would do, and I became enthusiastic over it. At the time I bought my stock I was talking to Mr. Muraine at the front of the store, and Mr. Muraine was alone. The representations made to me in reference to the stock were made by Mr. Muraine, and Mr. Muraine told me that they were going to send me the \$40.00 for the use of my place.

Redirect examination.

Questions by Mr. Reames:

Q. Now, these statements that you say were made relative to what was to be done with the money for the sale of the stock, were those statements made by Muraine alone or by Muraine and Gernert?

A. Why, most of them by Mr. Gernert was made that way.

Q. Were those representations made to you by Gernert?

A. No, to the customers that came in.

Recross examination.

Questions by Mr. Maguire:

Q. Mr. Gernert didn't, at the time you bought your stock—Mr. Gernert had no conversation with you at all in regard to it?

A. No.

Q. And he was out of town, as a matter of fact, a good deal during the time?

A. In and out all the time.

Hiram S. House, being recalled by the Government, testified as follows:

The books and records of the United States Cashier Company show that certificate of stock numbered 2727 was issued to G. H. Moore on December 26, 1911, for ten shares. The stub of certificate 2727 shows it was transferred from certificate 2702, which stood in the name of Mr. Frank Menefee. The company received

no benefit from that transaction. Certificate of stock numbered 2722 was issued to Mr. J. W. Zufall on December 6, 1911, for ten shares. The stub of certificate 2722 shows that it was transferred from a certificate standing in the name of Mr. Frank Menefee, being certificate numbered 2702. The United States Cashier Company received no benefit from that transaction. Moore and Zufall stock was transferred to him from the certificate which originally stood in the name of Overlin, and was issued to Overlin in payment of wages due him.

W. A. Decker, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Reames.

I live at Leavenworth, Washington; have lived there seven years; am a railroad man by occupation. I purchased some stock of the United States Cashier Company from Mr. Muraine. I bought the stock in Mr. Moore's cigar store in Leavenworth. I bought five shares. Mr. Malthouse, an agent of the company, was with Mr. Muraine and there was another agent there; I believe I was introduced to him at that time; I think it was Mr. Gernert; Mr. Gernert, the defendant, looks like the same gentlemen that I talked to; I bought five shares and I paid twenty dollars a share for it. Mr. Gernert I believe told me that he came up from California, that he had sold an estate in California, and was going to put this money into this company. He figured it would be a good investment. Mr. Muraine

said that they were selling the stock to get money to finish paying off the payments, and to equip the factory with machinery to go ahead and manufacture the machines. They had with them a computing machine. Mr. Muraine said that the company would be paying dividends in less than two years. About the last of December, 1912, I came to Portland and visited the factory.

Cross examination by Mr. Maguire.

I bought the stock in December, 1911; it was on December 6, 1911; the conversations that I had were with Mr. Muraine. There were present Mr. Malthouse, Mr. Muraine, and I don't know whether Mr. Gernert was there at all—he may have gone out. There was a third person present whom I think was Mr. Gernert. As to this third man I am a little bit doubtful as to his identity.

Q. Now, I want you to examine, if you please, this pink slip, and I will ask if that is your signature that appears there in the middle of that piece of pink paper?

A. Yes.

Q. That is your signature—W. A. Decker, Leavenworth, Washington?

A. Yes, sir.

Q. That is the contract you signed at the time you made up your mind to get this stock?

A. Yes. I guess that is it, by the writing.

Q. Now, this is dated November 24, 1911. Now, for the purpose of refreshing your recollec-

tion, I am going to ask you to examine this again, and especially the signature which appears down at the bottom, under the printed words "O. E. Gernert" and will ask you whether or not the third person who was present there at that time wasn't Mr. Bilyeu? Not the defendant, but another Mr. Bilyeu?

A. Well, I don't know, you know. I can't tell you, because there was only those two fellows that I know.

Q. That signature was signed there at the same time yours was signed; the whole thing was filled out there at one time, wasn't it?

A. Yes.

Q. So we have Mr. Muraine there, and Mr. Malthouse and this third person, and seeing the signature "Bilyeu" there, doesn't that refresh your mind to the fact that Mr. Bilyeu was the third man that was there?

A. No, I don't think so. This gentleman here (indicating Mr. Gernert) looks like the man that was there. I am not sure about that, you know.

Q. You wouldn't be sure about that?

A. No, but that is the man that looks like the same man.

Q. But being so long ago, it is a matter a man might be mistaken about. Now, you paid for that in cash, you say?

A. I don't remember if I paid for it in cash. I either paid for it in cash, or give my note for part

of it, for a short time. I don't just remember about that.

Witness continuing:

That the machine that was shown to witness did everything that the demonstrators stated it would do; that he knew that the matter of dividends would depend upon a market that should be created and the expense of manufacturing, and on all those various elements, and it was on his faith in the machine and what the machine would do, that he bought the stock.

On cross examination there was offered and received in evidence the defendant's Exhibit V as follows:

"DEFENDANT'S EXHIBIT V.

No. of Shares	5	Amount	\$100.00.
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I hereby purchase from O. E. GERNERT, Sales Agent five shares of fully paid and non-assessable stock of the United States Cashier Company, for which I agree to pay twenty dollars (\$20) per share.

\$25.00 cash bal. \$25.00 per month.

W. D. DECKER,
Leavenworth, Wash.

Received payment on above	\$25.00
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Received payment on above by note	\$25.00
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O. E. GERNERT,
Sales Agent.
Per Bilyeu, Rep."

The witness further testified as follows:

Q. Now, as I understand it, Mr. Gernert was not present at the time Mr. Muraine told you about this matter?

A. No, I don't think he was in there, because I met Mr. Muraine outside, in front of the cigar store, and I think he left there and I went back to look at the machine.

Dr. C. R. Zener, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Reames.

I live at Wenatchee, Washington; have lived there for five years and am a physician. I bought some stock of the United States Cashier Company, and I bought it from Mr. Muraine. He came to my office, asked me to go down and see the machine, which was on exhibition there in the city, went into details as to what the machine would do, the different kinds of machines they would make and put upon the market, and showed me how the machine he had with him worked. I bought twenty-five shares of stock at twenty dollars a share. I gave two notes for the stock; I have paid altogether \$470.00; I sent the money by check to the United States Cashier Company at Portland. Mr. Muraine told me that the money from the sale of this stock was to be used for the purpose of financing the building of the factory, installing machines, etc.

The Government offers in evidence letter dated January 31, 1912, written to Dr. C. R. Zener, Wenatchee, Washington.

Marked Government's Exhibit 297.

Q. I would like to have you examine this Government's exhibit 297, of date January 31, 1912, and tell the jury how and in what manner that came into your possession.

A. That was in reply to a letter of mine in which I made recommendations to the company, and came to me by mail in the regular course of business.

Exhibit 297 read as follows:

"Portland, Oregon, January 31, 1912.

Dr. C. R. Zener,

Wenatchee, Washington.

Dear Sir:

We beg to acknowledge receipt of yours of the 29th inst., enclosing check for \$50.00 to apply on your note which falls due February 15th, and proper credit has been given for same. You speak about "hoping to pay the note in full at this time," etc. Do you mean by that that you would need to have an extension of time after the due date, February 15th? Of course we wish to keep our collections up as promptly as possible, but let us hear from you and we will try to do the right thing.

Yours faithfully,

UNITED STATES CASHIER COMPANY,

Frank Menefee, President."

No cross examination.

Whereupon Hirman S. House, being recalled by the Government, testified as follows:

Direct examination by Mr. Reames.

The books and records of the United States Cashier Company show that stock certificate numbered 2721 was issued to Dr. C. R. Zener on December 6, 1911, for twenty-five shares. The stub of the certificate shows that it was transferred from certificate numbered 2702 which stood in the name of Mr. Frank Menefee. No part of that money went into the treasury of the company in payment for the stock. No part of the money mentioned in letter of date January 31, 1912, being Government's Exhibit Number 297 (letter from Menefee to Zener) went into the treasury of the United States Cashier Company for payment of the stock. The said books and records further show that certificate of stock numbered 2725 was issued to W. A. Decker on December 6, 1911, for five shares. The stub of this certificate shows that it was transferred from certificate numbered 2702, which stood in the name of Frank Menefee; that no part of this money went into the treasury of the company in payment for the stock. The records of the company show that on December 30, 1911, a credit was made to Mr. Gernert's account on the books of the United States Cashier Company for \$375.00, with the notation that it is for salary and expenses for five weeks from November 25, 1911, to December 30, 1911. Said records further show that on January 4, 1912, the company paid Gernert \$83.34 in

cash. On January 12, 1912, \$250.00 in cash. On February 5, 1912, \$25.00 in cash. On February 8, 1912, \$75.00 in cash. On February 10, 1912, \$150.00 in cash. On April 11, 1912, \$100.00 in cash. On May 8, 1912, \$100.00 in cash. On May 25, 1912, \$100.00 in cash. On June 11, 1912, \$50.00 in cash. On July 2, 1912, \$50.00 in cash. Making a total payment in cash of \$983.34, subsequent to December 30, 1911. Mr. Gernert's account was credited with \$513.60 on account of commissions. This would make a payment to Mr. Gernert of \$469.74 more than his commissions. In compiling these figures I have not taken into consideration any commission that Mr. Gernert might have made from the sale of private stock; the records of the company further show that the company has paid to Mr. Gernert in cash a total of \$8170.56 during the years 1910, 1911 and 1912; that the account was opened about the 1st of April, 1910. In these figures I am not taking into consideration any sums of money or any property that Mr. Gernert may have received on account of the sale of any personal stock either belonging to himself or anybody else, and these figures are exclusive of all amounts that Mr. Gernert may have received as commissions on the sale of private stock. In reference to the statements made in Government's Exhibit 295, being a letter from LeMonn to Gernert, the books and records of the United States Cashier Company show that on February 10, 1912, the company paid to Mr. Gernert \$150.00; the next date, February 21, 1912, \$250.00, does not appear on the company's books; the only payment mentioned in said letter which appears upon the

company's books is the first entry of date February 10, 1912, for \$150.00. The books and records of the United States Cashier Company further show that at this time Mr. Gernert is indebted to the company in the amount of \$1439.27. The last entry made in the account was on the 28th day of February, 1913, being a credit for seventy-five cents commission.

Cross examination by Mr. Maguire.

The payments that were made in February, March, April, May and June to Mr. Gernert were advances to Mr. Gernert. During this time there were credit commissions that were made to him. These were commissions for stock that had been sold prior to February, 1912. The commission would not be credited until the stock was paid for, notwithstanding the date of the sale.

Mrs. Ollie B. Howard was thereupon called on behalf of the Government and being first duly sworn testified, among other things that in May, 1913, she was secretary of the Swiss-American Milk & Chocolate Co. and at that time had a conversation with the defendant Gernert in which Gernert claimed to be seeking a position as stock salesman in her company, and that he had been employed by the United States Cashier Company, and that he had traded his stock for \$100,000 in property, and had received a large sum of cash; that he at that time explained to her the manner in which he had disposed of the stock of the United States Cashier Company, that he told her what it cost him for taxi cabs; that he would ride them about the city; wine and dine them; and that after they had absorbed the

spirit of spending so that they would part with their money more readily, that he would sign them up frequently in the "wee small hours of the morning," after having gotten them under the influence of liquor; that after he had told her that he became the salesman for her company.

On cross examination the witness testified that the defendant Gernert was employed by the Swiss-American Milk & Chocolate Company, during the months of May, June and July, 1913, and was called the Assistant Sales Manager of that company; she was thereupon shown an affidavit, which was received in evidence.

DEFENDANT'S EXHIBIT "W."

State of Washington,
County of King—ss.

O. B. Webb having first been duly sworn, on her oath says: That at all times herein mentioned she was and now is Vice-President and Secretary of the Swiss-American Milk & Chocolate Co., a corporation organized under the laws of the State of Washington, and personally familiar with the business management of said corporation; that during the latter part of May or the first part of June of the year 1913, affiant as an officer of the Swiss-American Milk & Chocolate Co., entered into negotiations with O. E. Gernert contemplating the employment of said Gernert as Sales Manager for the said Swiss-American Milk & Chocolate Co., that affiant thinking that said Gernert would ac-

cept the offer made by affiant on behalf of said corporation and for the purpose of saving time in the printing and preparation of stationery, proceeded to cause stationery to be printed upon which appeared the name of said O. E. Gernert as said Sales Manager and as Assistant General Sales Manager; that thereafter said O. E. Gernert declined to accept the position offered by affiant as aforesaid; that O. E. Gernert is not now an officer of said Swiss-American Milk & Chocolate Co., and is not in any way associated with nor connected with the said corporation, whether as agent, employee or in any other capacity, and never has been at any time connected with said corporation either as Sales Manager, Assistant General Sales Manager, or agent, employee or otherwise in any manner whatever connected with said corporation; that any representation which has been made to the public through the said Swiss-American Milk & Chocolate Co., as to the connection of said Gernert to said corporation has been made through the unauthorized, accidental and mistaken use of said stationery by officers or agents of the said corporation.

O. B. WEBB.

Subscribed and sworn to before me this 21st day of July, A. D. 1913.

Chas. T. Newcomb,
Notary Public in and for the State
of Washington, residing at Seattle.

The witness further testified that she signed the affidavit and swore to the same before a Notary Public whose certificate and seal was attached thereto; the witness further testified that she had been deceived into signing the affidavit by Mr. Gernert and that she had never read it before she signed it.

C. F. L. Smith, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Reames.

I am a minister by occupation. I live in Portland, Oregon, and have lived here about four years. I saw an exhibit of the United States Cashier Company in Portland, Oregon, on Oak Street. Mr. Gernert and other agents of the company were in charge of the exhibit. After I had seen the exhibit I saw the advertisements of the United States Cashier Company in the Oregonian. I saw these advertisements during the latter part of the year 1911. I purchased some stock from an agent of the company by the name of Evans. He was the agent who drew up the contract. I had a talk with Mr. Gernert in the demonstration room. Mr. Gernert talked of the machines, explained them to me, described what other companies had made with such propositions, and gave me all the assurance that he could that this was as good as they, and that this company would more than likely pay large dividends in the near future. He said that he thought that within a year the stock would raise to \$100.00 per share. I bought

eight shares of stock for \$12.50 per share and paid \$100.00.

Harry Wainwright, a witness called on behalf of the Government, being first duly sworn, testified as follows:

I am in the vacuum cleaning business and have lived in Portland for four years, during which time I have been a subscriber to and have read the Journal and the Oregonian. My attention was first called to the United States Cashier Company by the advertisements appearing in these papers, and after I had read these advertisements I went to the office of the United States Cashier Company on Stark Street and met Mr. O. L. Hopson. There were several men there. Mr. LeMonn was there; Mr. Gernert was there; Mr. LeMonn and Mr. Gernert told me that they were selling the stock to raise money to manufacture the machines, that the stock would rise in price and dividends would be paid probably the following year, 1912, and that the company was manufacturing five machines; that the machine was patented in this country and other countries.

A. I don't ever remember much conversation with either one of these men. It was Mr. Hobson that I did business with particularly.

Q. Now, I want to direct your attention to a conversation you had with Mr. LeMonn, and a conversation you had with Mr. Gernert.

A. I don't remember any special conversation with these gentlemen.

Q. The conversation that you have detailed was a conversation which you had with Mr. Hobson, Mr. O. L. Hobson?

A. What was the question?

Q. The conversation which you have detailed was one which you had with Mr. O. L. Hobson?

A. Well, he was very enthusiastic about the machine, and said it was patented——

Q. What I am getting at first—let's go over it again. You saw this advertisement in the Journal, you say, and went to the offices of the company, you say?

A. Yes.

Q. Now, who did you meet there, and with whom did you talk?

A. Met Mr. Hobson first.

Q. Who else did you meet there?

A. You mean personally meet there?

Q. Yes, who did you meet and talk with, yes?

A. There were several men there. Mr. Gernert was there, and Mr. Gloyd, I believe—Mr. LeMonn.

Q. Now, then, Mr. Wainwright, I now direct your attention to a conversation, if you did have one at that time, with either Mr. LeMonn or Mr. Gernert, relative to these machines, the patents on them, the stock that the company was selling.

Mr. Maguire: Witness has already testified he didn't have any conversation with Mr. LeMonn or Mr. Gernert about that.

A. I don't remember any conversation particularly. There were any number of people in the office at the time, and they were all talking together, and these gentlemen would make remarks to every one that was in there.

Q. Well, at the time you had this conversation, then, with Mr. Hopson, were Mr. Gernert and Mr. LeMonn both there?

A. I think so.

Q. Well, then, go ahead and detail fully what that conversation was.

Mr. Maguire: May I ask a qualifying question?

A. They said they had a very wonderful machine there, and it was patented, and undoubtedly it would be a big——

Mr. Maguire: When you say, Mr. LeMonn and Mr. Gernert were there, do you mean they were present close about when this conversation was taking place, or they were simply there in the building and you saw them around?

A. They were simply there in the office.

Mr. Maguire: They were not a part of the conversation with Mr. Hobson at all?

A. Beg pardon?

Mr. Maguire: I say, they were not taking part in this conversation between you and Mr. Hobson?

A. No, sir.

Mr. Maguire: I submit that is not competent. The fact that the man might have been in the building or in the office.

Q. (Mr. Reames): Let's get that straight. I will ask one more question about it. This conversation that you had there, was it a conversation that you had there with Mr. Hobson alone, or were these other two men there taking part in the conversation?

A. Not while he was talking, no, sir.

Q. You bought your stock, then, from Mr. Hopson?

A. Yes, sir.

Q. How much stock did you buy, Mr. Wainwright?

A. Buy and pay for?

Q. Yes.

A. Five shares.

Q. Now, go ahead and tell the jury what representations Mr. Hobson made to you at that time?

A. Said that the price of the stock would advance; by the first of the year it would double what I paid for it; that the following year they would be paying dividends—that is, in 1912 they would be paying dividends.

Q. What was said, if anything, by Mr. Hobson about the patent situation, and in how many countries did he claim to own patents?

A. He said the machine was patented in the United States, and a dozen other countries—Canada.

Q. What machine was that?

A. Change computing machine.

Q. Since you first purchased your stock, how many times have you been back to the offices of the company, and with whom have you talked there?

A. Probably four times all told, before I bought the stock, and talked to, I believe, Mr. Gernert—whoever happened to be in the office at the time.

Q. That is four times before you bought the stock?

A. Yes.

Q. Now, then, how many times have you been back to the office after you bought the stock, and with what officers of the company have you talked?

A. Beg pardon, what was the last part of it?

Q. I say, how many times have you been back to the offices of the company since you bought your stock—after you bought your stock, and to which officers of the company have you talked, when you were back after you bought your stock?

A. Been back there probably fifteen times since I bought the stock, and talked to Mr. Gernert, Mr. Gloyd, Mr. LeMonn, and I believe Mr. Stock, or Mr. Stott, assistant cashier.

Q. Ever talk with any of the other officers of the company about it?

A. I don't think so.

Q. Now, in these talks that you had with Mr. LeMonn, or Mr. Gernert, when you say you went back fifteen times, what was your object in going back and what were the talks about?

A. I wanted to see how things were going, find out what they were doing, if I could.

Q. And what, if anything, would be told you by these officers when you would go back, as to when the machines would be on the market?

Mr. Maguire: The Government is entitled to the conversations had with the witness; no question about that, but it seems to me, in fairness to the defendants and jury, these conversations should be divided. If he had a conversation with Mr. LeMonn, let's have that conversation. If with Mr. Gernert, let's have that one.

Q. Now, just directing your attention to these conversations after you bought your stock, that you say you had either with Mr. LeMonn or Mr. Gernert, those would be the only ones we would be entitled to. Now, can you remember any of those conversations?

A. Yes, sir.

Q. All right. Well, now, let's take the conversations and talks you have had with Mr. LeMonn. What would he tell you when you would come back, as to when the machines would be on the market?

A. Expected to have them on the market in the fall of 1912.

Q. And how many times would you be back, and how many times did Mr. LeMonn tell you that?

A. Probably three times.

Q. Now, then, referring to the conversations you had with Mr. Gernert, how many conversations did you have with him about it after you bought your stock?

A. Well, I spoke to him probably half a dozen times.

Q. And where?

A. Well, at the office in—I forget the building they were in.

Q. The Lewis Building, was it?

A. Yes.

Q. Now, can you tell the jury what the substance of those conversations were about when the machines were going to be put on the market?

A. Well, he talked very encouragingly indeed. He expected to have them on the market by 1912, the latter part of the year.

Cross examination by Mr. Maguire.

These conversations that I had with Mr. Gernert were during the latter part of 1911, and during a part of 1912. I can not remember exactly what time in 1912, but it was in March, April and June, any number of times. The conversations I refer to were conversations when Mr. Gernert was in the Lewis Building in Portland, Oregon; and Mr. Gernert told me that they thought they would have the machines on the market in the fall of 1912, and those were the only conversations that I had with Mr. Gernert. I don't think that Mr. Gernert ever told me anything about the patents.

Elmer C. Townsend, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Reames.

I am a locomotive fireman. I live at Vancouver, Washington. I purchased some stock of the United States Cashier Company from Mr. P. E. Muraine in October, 1911. I purchased twenty-five shares at \$15.00 per share. Mr. Muraine represented himself as an agent of the United States Cashier Company. He said that the company had large orders for the sale of machines, and that Meier and Frank had an order for the first hundred machines. I met Mr. Gernert once. I gave Mr. Gernert a mortgage on some lots in payment for the shares of stock, that is, I paid for the stock by giving a mortgage to Mr. Gernert upon my real property. Mr. Muraine called in Mr. Gernert, and told him that I had some lots, and would give a mortgage on them for these shares, and I gave Mr. Gernert a mortgage, but I never paid him. I finally gave Mr. Gernert a deed to the lots in payment for the stock. Mr. Gernert was not present at the time Mr. Muraine sold me the stock.

Hiram S. House, being recalled by the Government, testified as follows:

Direct examination by Mr. Reames.

The books and records of the United States Cashier Company show that in October, 1911, certificate of stock numbered 2120 was issued to Mr. Elmer C. Townsend

for twenty-five shares. The stub of this certificate shows that it was transferred from certificate numbered 50, which stood in the name of O. E. Gernert. No part of the money paid by Mr. Townsend, or that might have been paid, on account of that transaction went into the treasury of the company in payment for the stock. Mr. Gernert received no commission upon the sale of this stock.

Whereupon, N. C. Ovaitt, a witness called on behalf of the Government, testified that his name was Nelson C. Ovaitt; that he lived at Detroit, Michigan, and was engaged in the manufacture of coin paying machines, called the Payograph, was president of the Payograph Company, which was a corporation organized under the laws of Michigan, incorporated for \$300,000, with the principal office in Detroit, and having machines manufactured for it in New Haven, Connecticut; that he was acquainted with the defendant, Thomas Bilyeu, met him first in the summer of 1909, in the Ainsworth Block, Portland, Oregon; that the witness had been in Portland since 1892, first in the manufacture of silver spoons, later as an employee of Multnomah County, in the tax collection department, and later as coast agent for the Comptograph Company of Chicago, in the sale of adding machines, and also representing the Brandt Cashier Company in the sale of Brandt Automatic Cashiers. That he had devised the principles of a coin paying machine and had gone to Mr. Glover, a public engineer, with a view of having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr.

Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results, and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas, and Bilyeu was to proceed with the development and put it into working shape, and build a model.

Thereupon the counsel for the defendants, Mr. Pipes, asked the District Attorney: "May I ask what the purpose of this evidence is?" And the District Attorney answered to the Court and jury: "The purpose of this evidence is to show that back in 1909, witness, Mr. Ovaitt, was working upon a coin paying machine, and that he made a full and complete disclosure to the defendant Bilyeu; and we are going to then proceed to follow the making of the machine known as the Payograph, and the knowledge of the Payograph as it was brought home to the defendants, the attempted sale of a similar machine by the defendants in England, and their knowledge of the Payograph applications pending there; conversations had between Bilyeu and Menefee and LeMonn with this witness; bring these transactions down to the date where LeMonn made an investigation of the Payograph machines personally, and sent the telegram here that has been introduced in evidence."

Thereupon counsel for the defense, Mr. Pipes, asked: "For the purpose of showing that the Bilyeu patent is not good?" To which the District Attorney answered: "I don't know whether it will go that far or not, but

it will go to the extent of showing the knowledge of the defendants of the work that Mr. Ovaitt was doing."

Thereupon counsel for defendants interposed an objection to the said evidence, in the following language: "Now your Honor, I think I will interpose an objection upon that statement of counsel. The allegation in this indictment is that there were representations made that the defendants, the Cashier Company, had certain patents. It did have a patent, which it got from its predecessors, and there is a record of the company, which is called the Bilyeu patent. Now, in this case, I take it that this court has no jurisdiction to try out the question between Mr. Ovaitt on the one side, and Mr. Bilyeu on the other, as to who is entitled to that patent. That has been determined by the Department, and if there is an infringement or a conflict between Mr. Ovaitt and this defendant, that is a matter to be settled by a court having jurisdiction to try it, and it doesn't seem to me that collaterally, in this case, the Government can attack a patent upon an allegation that we didn't have it. If we have got it, and had it, it was a true representation; whether it is good, or conflicts with somebody else's patent, or Mr. Ovaitt's, would depend, of course, upon the decision of the court in a suit brought for that purpose. For the purpose for which this evidence is offered, I make the objection. If it is admissible on any other ground, of course the counsel could state it, but upon the ground of showing that Mr. Ovaitt and not Mr. Bilyeu is entitled to the benefit of that patent, and that Mr. Ovaitt and not this company, is entitled to the benefit of the patent, which the company

has got, we think that would be submitting to the jury a question that they ought not to have to try, because it might very well be said that, upon the evidence adduced in this case collaterally, if counsel is right in his contention, the jury might find that Mr. Ovaitt had the better right; I don't think they would, but they might, if it is competent for the evidence to be introduced; and yet upon a trial between them in a court having jurisdiction, it might be determined that Mr. Ovaitt didn't have the better right; so you might have a decree in a criminal case, or a judgment in a criminal case, deciding against the defendant upon that issue collaterally; and it seems to me that ought not to be submitted to the jury, at least for that purpose."

To which objection and argument the United States District Attorney replied as follows: "Of course, your Honor will remember that at the beginning of the Government's case, we introduced in evidence a contract entered into between the American Cash Record Company, on the one part, and the United States Cashier Company upon the other, by the terms of which certain patent rights alleged to be the property of the American Cash Record Company were sold to the United States Cashier Company. Now, one of the allegations in the indictment is that the stock in this company was worthless, and that these defendants knew it to be worthless. Now, anything that the Government could introduce that would tend to prove that this company, the United States Cashier Company, knew that what was being offered for sale had no value, would tend to sustain the allegations of the Government's complaint, that its stock

was worthless. If the Government were able to prove that the United States Cashier Company was demonstrating machines, even for which they may have owned a nominal patent, when one of the defendants knew of the great and grave danger that the company would experience whenever they proceeded to market or sell that machine, why, it seems to me that would be one element of fraud, and would go to substantiate the charge in the indictment that the stock of the United States Cashier Company was not of the value that it was represented to be by the defendants."

Thereupon the counsel for defendants, Mr. Pipes, asked the following question of Mr. Reames: "May I ask a question, Mr. Reames? Is this particular patent the one that you do not negative in the indictment?" and Mr. Reames answered: "Yes, the one that is not negatived in the indictment."

Thereupon counsel for the defendants made another objection, in this language: "Then there is another question that occurred in the early part of this case. The allegation is that the defendants represented that they had patents on all of these machines, whereas, in truth and in fact, the indictment says they had patents only on one. That is to say, this particular patent is not negatived, and that being so, I take it that that is an admission, and not a matter in issue in this case, as to the existence, and of course the validity of that patent. I take it that in an indictment, as in any other pleading, it is not sufficient to say that the representation is false, but it must be further shown by explicit allegation, in

what respect it is false. Now, when it is said it was a false representation, in this indictment, that all these machines were patented, whereas in truth and in fact, the truth was that one of them was patented, or at least that there was no misrepresentation as to this particular machine, I take it that that is not in issue, but that it is to be taken as true in this case, not subject to be determined by the court or jury, but admitted by the indictment that this patent was truly represented, and therefore it cannot be a false representation, and no evidence can be introduced that has the slightest tendency to show that this patent was not a perfectly good patent, because it was the duty of the indictment, of the District Attorney in drawing the indictment, if he meant to, to tender to the defendants an issue upon that, to notify us by making a proper allegation."

Whereupon the Court rules upon the said objection in the following language: "I think in view of the indictment, that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine. Further than that, I don't suppose in this trial that the validity of the patent that has been issued by the Government can be tried or determined. There is evidence in this case tending to show that LeMonn made a visit east along in 1912, and learned of this particular instrument, and that it was being manufactured, and that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose, I think this testimony of their

connection with this patent is material in this case, to show their good faith."

Thereupon Judge Pipes said: "I am content with this limitation, that these two matters will be instructed to the jury that the patent is (not) in controversy."

And the Court said: "In this case I understand it is admitted in the indictment."

And thereupon Mr. Reames said to the Court: "Before your Honor passes finally upon that, I would like to leave that part and pass on a little further, and offer it again this afternoon, and offer some authority upon it."

Whereupon the Court said: "You can go on with the testimony, and later if it should be deemed material you can present the force and effect of it, but with that limitation, it will be admitted at this time."

There had been evidence as stated by the court tending to prove that the defendant LeMonn had made a visit east in the early part of 1912, and learned of the manufacture of this particular instrument, and that he sent letters and telegrams to the defendant Menefee with reference to the matter which letters and telegrams described said machine, stated that he, LeMonn, believed it to be a winner and advised the defendant Menefee to not sell any more of the capital stock of the company until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of; that subsequent to the receipt of the said telegram the defendants Menefee and Campbell, at Portland, Oregon, caused the board of directors of the United

States Cashier Company to pass a resolution withdrawing all of the company's stock from the market and authorizing the defendants Menefee, LeMonn and Campbell to sell their own personal stock with the sales organization or sales force and the demonstration machines of the company, and that was the certain course of procedure referred to in the court's statement.

And thereupon the testimony of the witness was continued, and he testified that he disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod, so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position. That Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided sixty per cent to the witness and forty per cent to Bilyeu, and that was agreeable to witness, and that they shook hands on it. That Mr. Bilyeu said to him, "I will take you out to my model maker," which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin and said that the witness had been associated with Mr. Potter in the development of the machine, and had not been treated properly by Mr. Potter; that witness had devised a machine of his own and arranged with Bilyeu to develop it, and wanted Overlin to undertake the manufacture of a model; that Mr. Overlin accepted, and they returned to town. That Mr. Bilyeu advertised for a draftsman, and put him to work in the Ainsworth Building; that the model was constructed, and that a month or six weeks after that time Mr. Bilyeu said to the wit-

ness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for witness to make a better machine, and that Mr. Bilyeu said he could not do it.

The witness further testified that he went east the 2nd of May, 1910, and went first to the Comptograph Company, with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine. That he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910; that the second model was completed in 1912.

The witness was then shown photographs of the exterior of the machine, and identified them as photographs taken in August, 1910, and of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company.

The witness then continued that he returned to Portland the latter part of August, 1910; that he knew of a certain machine of the United States Cashier Company, known as the Bank Cashier, had heard of it and seen it, but never examined it closely; that he thought the machine was one that was covered by the application over the names of Bullington, White and Overlin; that in the year 1910 he met Mr. Bullington, and that he exhibited the three photographs in evidence to Mr. Bullington, in

August, 1910. That he had met the defendant F. M. LeMonn in the office of the Payograph Company, in Detroit, in January, 1912, and that LeMonn told him that he had been at the office of the National Cash Register Company, and had there been told of the Payograph; that LeMonn had a little booklet descriptive of the Payograph, which he said had been given to him by the Paymaster. Witness identified a book which he said was exactly like the one LeMonn showed him; that it was issued by the Payograph Company, and that it was the one that Mr. LeMonn brought to him at the time, one exactly like it and of the same issue, and that LeMonn said he had received it from the National Cash Register Company.

Whereupon the Government offered the said booklet in evidence, to which offer the defendant Gernert objected; the court overruled the objection and the defendant Gernert asked and was allowed an exception to the ruling; the booklet was marked as Government's Exhibit Number 306, and is as follows:

The witness, continuing, said that the defendant LeMonn said that he had been told of the Payograph by the Paymaster, Mr. Myer, and wished to see it, and, after questioning by the witness, said that he had been with the United States Cashier Company, but was not with them at that time, had got through selling stock, and was east looking for other things to finance, and asked the witness if he did not want him to take hold of the Payograph, and finance it, which the witness said he did not. The witness said he demonstrated the Payograph to Le-

Monn; that Mr. LeMonn expressed himself as pleased with it, went on east, and left his address, with the request that the witness think over the matter of financing the proposition and communicate with him if they decided to take him on to do the work. That the machine he demonstrated to LeMonn was the one described in the little booklet, that there was no model of it. The witness further said he took half an hour to demonstrate the machine; that the machine would pay money, list it and add it; that he did not take the case off the machine, the mechanical part of it.

The witness, further testifying, said that he met Mr. Menefee in October, 1913; that Mr. Menefee came to his office in October, 1913, and told him that he was the President of the United States Cashier Company, and asked what they were going to do with the British patents, or if the witness had sold them, and he said he had not; that Menefee asked what they were going to do with them, and he said he had no plans other than to retain them; that Mr. Menefee then told him they were arranging for a syndicate in Britain to take over their British rights, and that he felt that upon investigation by the people there they might run upon the application and it might possibly interfere with the deal, and that he thought for the good of both it might be well to make some arrangement whereby the patent of the Cashier Company in Great Britain would be included with the patent of the Oviatt machine; that Menefee described to him the deal; that it was to be a million dollar corporation, of which \$200,000 stock was to be paid to the United States Cashier Company, and \$50,000 in cash,

which was to be divided between Mr. Bilyeu and the United States Cashier Company, and that if the witness would come into the deal it would be split in thirds. That the witness wanted him to combine their entire interests in one large corporation. The witness said he took the matter under consideration, and afterwards, in about two weeks, told Menefee he would not entertain the deal.

The witness further testified that subsequent to this authorization and at the request of the defendants Bilyeu and Menefee, he had met said defendants in Chicago and that they had attempted to get the witness to go in with them upon a proposition by the terms of which the Payograph was to be included in a deal that the defendants had pending in England and the two said defendants represented to the witness that on account of the said conflict in Great Britain between the machine of the United States Cashier Company and the deal of the defendants could not be closed without the cooperation of the witness. The witness further testified that he refused to consider said proposition.

On cross examination the witness testified, among other things, that he claimed to be the inventor of the selector bar as directly connected with the case; that he acquainted Bilyeu of his selector bar idea in July, 1909, for the purpose of having Bilyeu make a complete model; that the payograph would be a competitor of the United States Cashier Company's machines, were both machines on the market; and that the payograph machine was at that time in interference with the bank cashier in the patent office.

The Government introduced a letter dated June 27, 1913, from defendant Menefee to one Joseph Hunter in which the statement was made:

“We have known of this Payograph proposition for the last three years and also have had quite full and complete information in regard to its state of development, and also the design. Of course I do not know just now how far they have gotten along, but unless they have changed their design absolutely from the way it was put up to me by the engineer who invented it, I would not care anything about them from an opposition standpoint because they are on the wrong system and our severe experience with our own product makes us know that only the very best kind of a machine will servive the ordeal.”

And the defendant Menefee introduced a letter dated April 19, 1912, from the defendant Menefee to one Robb in which the following statement appears:

“I learned something further at Detroit yesterday in regard to the Payograph which may be of interest to you.

“I do not know that I can describe the machine fully, but I think I can, in a way that will give you an understanding of their plan, and what they claim.

* * * * *

* * * I understand a patent application was filed by Nelson Oviatt, covering the first model or plan and that he is trying to inject into it the features of the new machine. The inventor of the new

machine is not willing that this should be done. Also, I might add that, because of these differences of opinion, the inventor has resigned his position with the Payograph Company and I have made arrangements for him to go west and take up the work for us, not later than May 15th. I also understand from him that Oviatt has stated that his application and claim are so broad that it will cover the idea of attaching a paying machine to an adding machine, or using the same interchangeable, regardless of the way it is worked out or the mechanism employed to carry into effect the use of the two machines in conjunction. Mr. Hayes, the engineer, who has done all the work on the Payograph and whom I have hired, seems to have the opinion that the construction of a complete machine would not infringe the idea, but that possibly he might cover the idea of attaching to adding machines and suggests that our disabling key might put us in the conflicting class.

The witness then proceeded to demonstrate the Payograph machine to the jury, testifying as follows:

Q. Will you take that machine and demonstrate it to the jury? (Witness proceeds to demonstrate) Tell the jury what the machine is and what it is designed to do, and what it will do.

A. This machine here is not my invention, this machine is a stock adding machine made by the Wales Company in Wilkesbarre, known as the Adding Machine Company. This coin paying device is my invention and is connected to this adding ma-

chine, so that when the key is depressed here and this handle of the adding machine operated the is ejected here into the hand or envelope; it is listed on the paper of the adding machine here, and is added on the wheels of the adding machine here. The connect and disconnect is at this point. There is a large operating lever. (Operating machine) This is simply a connecting link from the coin paying mechanism to the adding machine. By taking out that thumb screw you disconnect all of the pay mechanism so that you use your adding machine separate from the paying, so that you can list and add without paying money, or without ejecting money, but when that link is attached by that thumb screw, then the operation of the adding machine also operates the paying machine over here, so that when you put down a key here and pull your handle, that amount will be ejected over here to the hand or envelope, recorded on the paper here and added on the wheels here. Whenever you wish to add and list without paying, as I have said before, take this thumb screw out and you at once have separated your adding and paying mechanism, or the machine can be lifted bodily from this and the adding machine taken off to other parts of the office and used independently of this.

Q. In other words, the machine is so constructed that you can use the adding machine with or without the coin paying mechanism?

A. Yes, sir.

Q. And they are detachable?

A. Detachable, yes.

Q. And so arranged that by the manipulation of this screw or device on the end of the machine the adding machine either will or will not work in conjunction with the coin paying mechanism?

A. That is right.

Q. In other words, to make it plain, if you are using the adding machine as such, by handling it in the manner you have described, you could mark the number of figures by depressing the proper keys indicating the proper amounts, and that would add into the adding machine, without working the coin paying mechanism at all.

A. Yes, sir.

Q. And then by replacing that screw, the adding machine would perform exactly the same work, and in addition to that the proper amount of change would be paid out of the coin paying mechanism?

A. That is right.

Q. Now, what is the feature of novelty about that arrangement and about that machine—what is the main feature of novelty?

A. The ability to separate the adding mechanism from the paying mechanism is one of the principal objects.

Q. Now, to what sort of adding machines can this coin paying mechanism be attached?

A. This coin paying mechanism has been attached to the Wales machine, to the Burroughs machine, and can be adapted to be attached to any regular type of adding machine.

Q. Do I understand you then that in the marketing of this machine you could simply sell the frame of the coin paying mechanism and they would connect it on to the regular adding machine, without the necessity of purchasing an adding machine?

A. This one here could be. This one would have to be taken into the shop and the key stems extended; that one there is a stock machine connected with the other machine.

Q. The machine you have been demonstrating now is the first model?

A. That is the first model.

Q. Have you the latest model of the payograph machine?

A. This is the latest model.

Q. Now, demonstrate to the jury the latest model.

A. This here is what is termed the Burroughs Visible Adding Machine; this here is the payograph with the extension or mezzanine keyboard, so that when you depress a key here you set the mechanism not only for the paying but also for the adding machine beneath, and pressing the corresponding key of the adding machine; then when you operate the handle here you not only list and add on the adding machine but you pay that amount over here; this can operate independent of this, that is the adding machine independent of the coin paying, simply by changing this button on this side. With it in position it would pay, list and add; with the button turned that way, it would add, list, but would not

pay. Then this machine, the adding machine, can be taken out bodily from beneath and used as an ordinary adding machine about the office the days they don't wish to pay off.

Q. Now, what is the feature of novelty in that machine, Mr. Oviatt?

A. The principal feature is the same as in that, ability to separate your adding mechanism from your paying mechanism.

Q. You claim to be the inventor of any part or portion of the adding machine?

A. No.

Q. What adding machine do you use in connecting your machine to it?

A. We are using right here the Burroughs.

Q. What is the reason, the main reason, for simply connecting your machine to it, instead of making an adding machine of your own?

Q. Well, there are many reasons. One reason is that we don't care to go into an experimental field and take our chance to patent suits with the adding machine companies. We also wish to avoid the expense incidental to the manufacture of adding machines. We get the support of the adding machine company and salesmen rather than their non-support. Furthermore, any company as a rule which has employees enough to warrant the using of a paying machine of this type already owns an adding machine. They pay off once a week as a rule, and by attaching to the adding machine which they already own they are saved the expense incidental to buy-

ing a complete adding mechanism, which we might otherwise have to devise and build into the machine.

Q. In other words, a company to whom you might want to sell already owning an adding machine would not have to buy the complete outfit?

A. No.

Q. Now to what machines, Mr. Oviatt, can you—to what sorts of adding machines and kind of adding machine can the payograph be attached, and from which it can be detached?

A. We can attach to the Wales, Burroughs, White, made in New Haven, Connecticut, to the Universal; that is owned by the Burroughs. That is practically all of the machines in the market having the ordinary type of key board.

Q. What is the fact as to whether or not the adding machines you have mentioned are the principal adding machines that there are being manufactured and sold in the United States?

A. There are only two principal adding machines, that is the Burroughs and the Wales, at the present time. The White in New Haven hasn't attained very much publicity.

Q. Now is it—this machine that you have demonstrated before the jury, this last machine, Mr. Oviatt that is in interference with the machine of the United States Cashier Company, known as the Bank Cashier?

Mr. Pipes: Now, may it please the court, that still raises the question.

Mr. Reames: I wont insist upon it until I present my point."

There was no other evidence offered by either party or received in the case tending to prove that the defendant Bilyeu had communicated to any of "the defendants" or to the defendant Gernert the matters and facts testified to by the witness Oviatt, nor was there any other evidence offered to prove that any of "the defendants" or the defendant Gernert had knowledge of the matters and facts testified to by the defendant Oviatt, except that incorporated in this Bill of Exceptions.

To each and every question and answer of the testimony of the last named witness, the defendant Gernert, by the stipulation hereinbefore referred to, had an objection which was overruled, and to which action of the court an exception was duly granted.

Whereupon the United States Attorney, on behalf of the United States, offered in evidence and the same was duly received, the following exhibits, the Government having previously proven that each, every and all of said letters had been written by the said respective defendants to the said respective addressees, and that the said writers of said letters had either deposited or caused said letters to be deposited in the mails of the United States for mailing and delivery at the date of said respective letters, and the Government had theretofore proven the genuineness of each of the notes and receipts below mentioned.

Ex. No. 66, letter from Menefee to Gernert, May 16/12.

Ex. No. 124, circular letter from LeMonn to all salesmen including Gernert, Mar. 6/11.

Ex. No. 125, circular letter from LeMonn to all salesmen including Gernert, May 29/11.

Ex. No. 128, circular letter from LeMonn to all salesmen including Gernert, June 19/11.

Ex. No. 131, circular letter from LeMonn to all salesmen including Gernert, July 18/11.

Ex. No. 133, circular letter from LeMonn to all salesmen including Gernert, July 25/11.

Ex. No. 154, circular letter from LeMonn to all salesmen including Gernert, Dec. 2/11.

Ex. No. 156, circular letter from LeMonn to all salesmen including Gernert, Dec. 9/11.

Ex. No. 157, circular letter from LeMonn to all salesmen including Gernert, Dec. 20/11.

Ex. No. 267, circular letter from Menefee to all salesmen including Gernert, May 16/12.

Ex. No. 287, note from Zufall to Gernert, Dec. 9/11.

Ex. No. 288, letter from Gernert to LeMonn, Feb. 24.

Ex. No. 289, letter from LeMonn to Gernert, Mar. 2/12.

Ex. No. 290, letter from Menefee to Gernert, Dec. 5/11.

Ex. No. 291, letter from Gernert to Menefee, Dec. 14/11.

Ex. No. 292, letter from Menefee to Gernert, Dec. 9/11.

Ex. No. 294, letter from LeMonn to Gernert, Mar. 2/12.

Ex. No. 298, circular letter, from LeMonn to all salesmen including Gernert, June 5/11.

Ex. No. 376, circular letter from LeMonn to all salesmen including Gernert, July 15/11.

Ex. No. 440, letter from Menefee to Gernert, Mar. 12/12.

Ex. No. 242, letter from Gernert to C. B. Clark, July 11/12.

Ex. No. 243, receipt from Gernert to C. B. Clark, Aug. 9/12.

Ex. No. 244, letter from Menefee to C. B. Clark, Aug. 19/12.

Ex. No. 295, letter from LeMonn to Gernert, Mar. 23/12.

Each of which said exhibits, by stipulation of counsel for the defendant, Gernert, and for the United States of America, and by the direction and with the consent of the court, have been transmitted to the Circuit Court of Appeals with the Bill of Exceptions of the defendant, Frank Menefee, and it has been stipulated that said numbered exhibits may be used, read and referred to by counsel to the same extent as though copied in as a part of this Bill of Exceptions.

Mr. Reames: I am now about to offer in evidence Government's Identification 115, which forms

the basis of overt act No. 1, a letter written by Mr. Bonnewell. I have a stipulation with Mr. McHenry to the effect that the letter was written by Mr. Bonnewell and mailed, and I want him here before I introduce it.

Mr. Maguire: Before the Government offers in evidence any evidence of overt acts, I would like at this time that the court require the United States Attorney to declare whether he elects to prosecute these defendants for a violation of Section 37 of the Penal Code, or for a violation of Section 215 of the Penal Code. The indictment is drawn in such a general manner that there will be difficulty in determining except by the number put at the top of the indictment whether it is a violation of Section 37, or a violation of Section 215, and in order that the defendants may preserve the record, it seems to me at this time we are entitled to know from the District Attorney upon which section he elects to proceed.

Mr. Reames: As stated in my opening statement to the jury, and as stated in the indictment itself, this is an indictment for a violation of Section 37 of the Penal Code.

Mr. Maguire: Does the United States Attorney contend that the various overt acts set out in the indictment were the overt acts referring to, and in pursuance of the particular conspiracy set out in that indictment?

Mr. Reames: Yes.

Mr. Maguire: Refer to no other.

Mr. Reames: Yes, the ones attempted to be proven at this time.

Mr. Maguire: There have been offered and received numerous exhibits from Exhibit 120 to Exhibit to 272, consisting of letters purporting to have been signed and mailed by the United States Cashier Company and by Mr. LeMonn as its sales agent, and Mr. Menefee as its president. Do I understand that it is the contention of the Government that these letters were written and mailed in the United States mail?

Mr. Reames: Yes.

Mr. Maguire: That is a matter of record now, so we may proceed and rely upon it?

Mr. Reames: Yes. The evidence of the Government has offered as to the manner in which these exhibits came into our possession, and the Government now claims it is proved by circumstantial evidence that these letters and various exhibits referred to by counsel were written and mailed in the United States mail in the ordinary course of business.

Mr. Maguire: And were mailed and relate to and refer to the particular conspiracy set out in the indictment?

Mr. Reames: Yes.

Mr. Maguire: And were in execution of that particular conspiracy?

Mr. Reames: I think so. The next is Government's Identification 212. That is the one identified by the witness Klein as having been received by him in New York City.

Mr. Pipes: No objection to the identification on our part.

Mr. Reames: Then may we have the admission that on July 23, 1912, Mr. Frank Menefee, either deposited or caused to be deposited this letter of date July 23, 1912, in the United States mails at Portland, Oregon, and at that time it was enclosed in an envelope, and had its postage fully prepaid?

Mr. Pipes: Yes.

Mr. Reames: The Government then offers in evidence letter of date July 23, 1912, Government's Identification 212, identified by the witness E. Klein when he was on the stand, as having been received by him at New York City, a few days after July 23, 1912, and the Government offers it as forming the basis of Overt Act No. 2.

Mr. Maguire: On the part of the defendant Gernert objection is offered to this testimony, on the ground that it is not an overt act for the purpose of executing the conspiracy set out in the indictment, for the reason that assuming the Government's contention to be true, and the allega-

tions of the indictment to be true, the conspiracy, if any, had been fully executed and terminated and performed, at least as early as June, 1911.

Now, may it please the Court, the defendants in this case are charged not with having devised a scheme to defraud, not with violation of Section 215 of the Penal Code, but with having conspired to commit an offense against the United States. The District Attorney has conceded that all the letters which have been offered in evidence, and which he claims, and which of course for the purpose of this argument is admitted went through the mails, were written and mailed for the purpose of executing the scheme to defraud, which he has set out and alleges to be true, in his indictment. Now, the gist of that offense is not in the promoting of the scheme, but it is in the use of the mails to carry out an alleged scheme to defraud. The defendants are charged in this indictment with having conspired and confederated together to commit that particular offense; that is the offense of placing a letter in the mails for the purpose of executing the particular scheme to defraud set out in this indictment. Now, when that offense, that is, when the objects of the conspiracy have been consummated, there can be no further acts committed by any one, to be charged in the indictment or to be offered or admitted in the evidence, for the crime, if any, has been committed.

Court: This indictment charges a continuing conspiracy.

Mr. Maguire: Quite so, your honor. And under the continuing conspiracy the statute of limitations does not commence to run from the first overt act, but from the last overt act, but it must be an overt act for the purpose of committing the particular offense set out in the indictment. Now, the particular offense set out in the indictment is the use of the mails for the purpose of defrauding, the mailing of a letter, rather, to carry out a scheme set out in the indictment, and the District Attorney says that the scheme had been formed in September, and that these particular letters set out in 1911 and offered in 1911 were for the purpose of executing the scheme. Now, the conspiracy must have existed in the minds of the defendants prior to the devising of the scheme, and when that offense was completed or committed, if any at all,—of course, I merely assume that for the purpose of this argument, because it is in effect a demurrer to the evidence and to the indictment—when that was completed, then there was nothing further to do. Now, let's take this state of facts, that counsel has put in here. He said that these defendants got together in September, 1910, for the purpose of devising and executing a scheme to defraud. Now, that offense was committed, and that conspiracy was consummated, at the time the first letter was placed in the mails for the pur-

pose of executing the scheme. Now, any further acts, any further mailing of letters, were separate and distinct offenses. Any agreement or conspiracy was a separate and distinct conspiracy, and cannot be joined in the same count of the indictment, and it is a question whether they are permissible to be charged in the same indictment, and unquestionably that cannot be done in the same count of the indictment. Therefore, under the District Attorney's own admission these particular letters did not refer to completing and committing an offense, if any offense at all was committed.

Argument of Counsel.

Court: I understand your position, and I don't think it is necessary to take up any more time on it. I have ruled on that question a good many times, and as long as the indictment charges a continuing offense, as it does in this case, I think it is competent for the Government to give in evidence any act that may be selected by it as an overt act, providing it has charged a continuing conspiracy, and I don't think the first overt act terminates the conspiracy so the objection will be overruled.

Mr. Maguire: Save an exception.

Mr. Pipes: That applies also to all the other defendants.

Court: 'The same objection goes to all the defendants, and an exception.

Whereupon, the United States of America offered in evidence each and every letter set forth in the indictment as overt acts, being therein numbered as overt acts I. to XVI, each defendant admitting that said letters were written and mailed at the times and places mentioned in the indictment to the admission of each of which, for the reason hereinbefore set forth the defendant Gernert duly made objection, which objection was overruled by the Court. To the action of the Court in overruling said objection and in admitting said letters in evidence as proof of the overt acts set out in the indictment, the defendant Gernert was allowed an exception.

Whereupon, the United States of America rested its case, and the following proceedings were had:—

The defendant, Gernert, offered in evidence in his behalf the following exhibits, which exhibits were received in evidence without objection:—

Ex. No. T, note, Dec. 2/11.

Ex. No. U, Contract to Purchase, from Lew Paramount to Gernert, Dec. 2/11.

Ex. No. V, Contract to Purchase, from W. A. Decker to Gernert, Nov. 24/11.

Ex. No. U-5, Letter from Gernert V-788, Mar. 6/10.

Letter from Allen Todd to Gernert, Mar. 7/10.

Letter from Allen Todd to Gernert, Mar. 10/10.

Letter from Allen Todd to Gernert, June 8/10.

Circular letter from Company.

Letter from LeMonn to Gernert, Mar. 24/11.

Letter from E. C. Baker to Gernert, May 23/11.

Letter from LeMonn to Gernert, May 23/11.

Letter from Menefee to Gernert, May 18/11.

Circular letter from LeMonn to Gernert, May 25/11.

Letter from Menefee to Gernert, Sept. 18/11.

Letter from LeMonn to Gernert, Nov. 10/11.

Letter from LeMonn to Gernert, Dec. 2/11.

Letter from Menefee to Gernert, Dec. 21/11.

Letter from Menefee to Geo. H. Moore, Feb. 9/12.

Letter from Menefee to Leavenworth St. Bank,
Feb. 9/12.

Letter from LeMonn to Gernert, June 15/12.

Letter from LeMonn to Gernert, Feb. 6/12.

Letter from LeMonn to Gernert, Feb. 19/12.

Prospectus (The Automatic Cashier), Twentieth
Century Wonder.

Each of which said exhibits, by stipulation of counsel for the defendant, Gernert, and for the United States of America, and by the direction and with the consent of the Court, have been transmitted to the Circuit Court of Appeals with this Bill of Exceptions and hereby made a part hereof as fully and completely as though copied into this Bill of Exceptions.

Whereupon, the defendant, Frank Menefee, took the stand, being first duly sworn, testified among other things, as follows:

Q. Mr. Menefee, in the closing of the examination Saturday I had just begun to ask you about

the establishment of agency for the sale of machines. I will ask you as to whether or not you established such agencies and where, in what parts of the country?

A. We established a number of agencies. That is, we made an arrangement for agents who would take the sale of the machine as soon as they were on the market. I am not certain as to the exact date, but the first one that was arranged for was in Illinois with a company through a Mr. Griffith, and I think that was probably March or April, 1911.

Q. And were there other agencies?

A. Yes, there were a number of others. I could not give the dates of them—I haven't any of the contracts here; but during 1912 and also during 1911 there were a number of agencies arranged. I remember particularly that Mrs. Armstrong was promised the agency for Southern California and Arizona and afterwards got her contract. And a Mr. Wolcott had the agency for Ohio. And I think the Hall boys were later given, on a sort of promise, an agency for Iowa. Mr. Dix at St. Louis was given an agency contract for Missouri, and about the last, and then there was a Mr. Dickman that arranged for an agency for some of the southern states—I think, Florida, Georgia and the Carolinas, something like that. And Mr. Tillinghast, for the State of New York, and Mr. Robinson Swift, for the New England States.

Q. Now in contemplation of the manufacture of what machines were the agencies formed?

A. Well, the general line of machines, the first that we put on the market; that is the pay-roll machine principally—probably afterward termed the pay-roll machine. It was then being called the cashier machine.

Q. I will ask you Mr. Menefee as to whether or not you solicited these agencies or did they come to you.

A. No, they solicited us for the territory.

Q. What was the cause for that do you know?

A. Well, because they had confidence in the machine being a commercial article, and one that would be valuable to an agency.

Q. Had they seen these demonstrations?

A. Yes, they had seen the machines, all of them.

Q. I speak of that, this latter question, with reference to the manner in which these machines were received throughout the country where they were shown.

A. They had all seen the machines demonstrated, and most of these people I refer to had been in Portland, as well, and saw the factory, and had visited with us here for a number of days, I think all of them.

Q. Here in the city?

A. No.

Q. And was not in the management of the Company itself, I imagine?

A. No, not in any way. He was entirely subject to the orders of the rest of us inside.

Q. When the demonstration of the machines was given to you, do you remember what particular machine was demonstrated by Mr. Gernert, for example?

A. I think Mr. Gernert demonstrated the Bilyeu cashier almost exclusively, if not quite so.

Q. That is the machine which was developed into the one Mr. Baker—

A. Yes. It is the Bilyeu cashier, the first model of the paying machine.

Q. And for which a patent was issued?

A. Yes.

Q. Now, Mr. Menefee, I believe you have spoken about the literature—the advertisements and the circulars and matters of that kind which have been offered in evidence here. I refer particularly to the newspaper advertisements and your reports of assets and liabilities, and the reports and statements in relation to the prospects of the concern, which are here. That was part of the literature of the Company, and as such you issued it, did you not?

A. Yes, we did.

Q. And you assume responsibility for that; the office assumes responsibility for that?

A. Yes, the office has to take the responsibility for that. The salesmen have nothing to do with that.

Q. They were entitled to use that just as much as the public generally?

A. Yes, they were. Yes.

Q. Had seen the manufacturing establishment?

A. Yes.

Q. And what were you doing out there?

A. Yes.

Q. After the factory was built?

A. Yes. And I will take that back about that being in March, 1911, that the Chicago agency was established. That was in 1912, I think, because it seems to me that I remember very distinctly Mr. Welky, who was the main one in the syndicate forming the company to sell that machines in Illinois, being here when the factory was running at Kenton.

Q. In that connection did Mr. Gernert have any contract of agency or promise of such contract?

A. Of course, he had asked to be considered; and Mr. Todd who was in charge before I was had held out inducements to him and talked to him about the Pittsburg agency; and had Mr. Gernert remained with us, it is probable that he would have had an agency contract with the company.

Q. How did he come to be appointed as assistant sales manager?

A. Mr. Gernert was with the company before my time as manager, and he was a man who knew about the selling and the field work pretty well, and

was one that for some time there we depended on in assisting us in the field work and training other salesmen; but he was only assistant sales manager purely in the field and outside ways, and had nothing to do with the inside work or the office.

Q. He was not a member of the board of directors at any time?

A. No, not at any time.

Q. Never an officer of the company?

MR. CAKE: Q. I have here a statement which Mr. House very kindly furnished me, stating that Mr. O. E. Gernert went into the employ of the company in April, 1910, and continued until April 1st, 1912. That is correct is it?

A. No. I don't think Mr. Gernert did any work particularly for the company after the first of January, 1912.

Q. The first of January, 1912?

A. Yes.

Q. Speaking of Mr. Gernert, was there an agency for the State of Washington which Mr. Gernert was anxious for?

A. Yes, he was talking about that. I think that was perhaps in 1912. That was after he was really not working for the company. He undertook to make a syndicate and get the Washington agency.

MR. PIPES: The agency to sell machines?

MR. CAKE: What kind of an agency was it?

A. To sell machines.

Q. When were they manufactured?

A. Yes, but he did not make his arrangement.

The defendant Menefee, while being cross examined by the United States Attorney in relation to certain private stock deals testified in part as follows:

Q. Bert Sallaberry has testified he paid thirty dollars a share for a large block of stock in the fall of 1913 purchased from Mr. Todd.

A. I sold that stock to Mr. Todd for six dollars a share. He paid cash for it before I knew anything about the sale.

Q. Then Mr. Todd made a profit of twenty-four dollars a share?

A. If he sold it for thirty dollars, he did.

Q. John Sallaberry during the same period of time bought a large block of stock at thirty dollars a share.

A. That was the same price, six dollars a share.

Q. John Irrigoin bought a large block of stock at thirty dollars.

A. That was six dollars a share I received.

Q. Mr. E. A. Mulkey—

A. (Interrupting) I received the same for that.

Q. He bought a large block of stock at thirty. Did Todd make twenty-four dollars a share?

A. He got it from me at six.

Q. Mr. R. L. Anderson bought a block of one hundred shares.

A. All the stock I sold to Todd, he paid me the cash at six dollars a share.

Q. Lew Paramore bought fifty shares of your stock through Mr. Gernert at twenty dollars a share.

A. That was not part of this block. That was stock I had bought off the market before.

Q. How much did you get out of that transaction?

A. The expenses on that little trip of Mr. Gernert, in which he sold a few sales over there, that was a losing proposition altogether. I don't know what I got.

Q. Fifty shares of stock, twenty dollars a share, one thousand dollars, and you didn't get anything out of it?

A. No, I didn't say I did not get anything out of that item, but the stock sold was under an arrangement whereby he was to go out and get a commission for the sales and turn in the proceeds to me. The expenses were advanced. The trip did not pay expenses and commissions, and we lost out on it.

Q. Well now, Clarke, one hundred shares at twenty dollars a share, C. B. Clarke.

A. That was issued from my stock and I got a four hundred dollar payment, I think, on the first sale and paid the commission out of that. The sixteen hundred dollars, the second sale, the note is turned over to the company, is now held by the company and by Mr. Mears. I really have never had credit on the books for it. I furnished the stock.

Q. Now, there was Moore, twenty dollars a share. How much did you get out of that?

A. The net out of that should have been fourteen if the commissions that we earned paid the boys' expenses, but they didn't do it.

Q. There is the sale to Deckers, five shares, twenty dollars a share.

A. That was the same lot. My answer to that is the same.

Q. John Scott, twenty-five shares at twenty dollars a share.

A. The same answer to that. The Commission was thirty per cent. twenty-five to the agents and five per cent overhead to Mr. Gernert. If he made the sale himself, he got all the commission.

Both parties having rested their case, the defendant Gernert moved the Court as follows:

Comes now the defendant, O. E. Gernert, and prays the court to direct the jury in the above entitled cause to return a verdict of not guilty as to the defendant, O. E. Gernert, upon the following grounds and for the following reasons:

I.

That the indictment does not state facts sufficient to constitute a crime.

II.

That the indictment charges more than one crime.

III.

That there is no evidence tending to show the formation of any conspiracy described in the indictment.

IV.

That the evidence is not sufficient to show any confederation agreement or conspiracy on the part of the defendant, O. E. Gernert, with the defendants named in the indictment.

V.

That the evidence shows that the conspiracy, if any, was terminated and completed more than three years prior to the filing of the indictment.

VI.

That upon the face of the record it appears that none of the overt acts charged in the indictment were committed prior to the termination of the conspiracy and effectuating its said object.

VII.

That it appears from the face of the record that the defendant, O. E. Gernert, was not associated with the conspirators named in the indictment nor employed by the United States Cashier Company within three years of the filing of the indictment.

ROBERT F. MAGUIRE,
Attorneys for O. E. Gernert.

Whereupon the Court heard argument of counsel and denied said motion and refused and failed to direct the jury to find the defendant, O. E. Gernert, not guilty. To which action of the Court and to his said refusal and failure to so instruct the jury, an exception was duly allowed to the defendant, O. E. Gernert.

Before counsel argued the case to the jury the defendant O. E. Gernert in writing in due and proper form and manner, requested the court to give the following instructions:

I.

The defendants in this case are charged by the indictment with the crime of conspiracy, in that they conspired and agreed together to violate Section 215 of the Penal Code of the United States by conspiring and agreeing to devise a scheme to defraud, and to execute the same by the use of the postal establishment of the United States.

The following are the essential elements of the indictment:

First, that there was a conspiracy, agreement or understanding upon the part of each and all of the defendants:

Second, To devise the particular scheme to defraud set out in the indictment, and

Third, To use the post office establishment of the United States for the purpose of executing the scheme.

It is therefore incumbent upon the government to establish, beyond a reasonable doubt, not only that the defendants and each and all of them conspired and agreed together to devise this particular scheme, but at the time it was a part of the conspiracy and a part of their understanding that the scheme to defraud should be executed by the use of the Post Office establishment of the United States. And if, as to any one or more of the defendants the government shall fail to produce competent evidence to prove any or more of those elements, then it is your duty to find such defendant or defendants not guilty.

II.

Under the doctrine of law that I have just stated, even though you might find from the evidence that the defendants agreed together to devise a scheme to defraud, yet, if they did not at the time of forming a conspiracy have in their minds the use of the mails of the United States for the purpose of executing such scheme to defraud, then the government would have failed in its case and you should find the defendants not guilty.

III.

Again, even though you should find from the evidence that fraud or injury resulted from the acts of one or more of the defendants and was brought about or executed in whole or in part by use of the mails, yet, if you could not find that there was an agreement or understanding between the defendants and all of them to devise such a scheme and to execute it in the manner herein-

before alleged, then you must find the defendants not guilty.

IV.

Gentlemen of the Jury: You are further instructed that it is not sufficient for the government in this case to show that certain of the defendants combined to perform certain acts and some one or more combined with others to perform different acts, even though the defendants had a similar purpose in view, but the evidence in this case must show beyond a reasonable doubt that each and all of the defendants agreed and conspired together to do these things.

V.

While a conspiracy may be proven by circumstantial evidence, yet the circumstances upon which the government relies for its proof must be such as to show that there was an agreement or understanding, and the mere fact that the testimony in the case may show that two or more defendants on different occasions did acts of a similar nature looking toward the same end or result, would not constitute, as a matter of law, a conspiracy. There must be evidence tending to show that the defendants and each of them agreed and combined together to do the acts set out in the indictment.

VI.

The existence of a conspiracy cannot be established as to one of the defendants by the acts or declarations of another defendant committed in his absence and with-

out his knowledge or concurrence, nor can the connection of a particular defendant to a conspiracy be established or proved by what is said or done by another person alleged to be a co-spirator. Therefore, in determining whether or not there was a conspiracy and whether or not any particular person was a party to such conspiracy you are limited to the things done by him, and unless you find beyond a reasonable doubt from his acts that he had an intent to defraud and that he had knowledge that the Company did not have, own or control the patents which it claimed to have and that he knew the Company did not intend to manufacture such machines (if you find from the evidence it was not their intention so to do) and that he knew that the Company did not have bona fide orders for its machines and that he knew that the Company would not make large profits and that he knew that the financial condition of the Company was not excellent but was insolvent and that the liabilities of the corporation greatly exceeded its assets and that he knew that the stock by reason of these things was worthless. In other words the government has alleged in the indictment that the stock in this corporation was worthless by reason of certain alleged facts and conditions which it sets out in detail, and before you can find any particular defendant guilty under this indictment it will be necessary for you to find beyond a reasonable doubt that such defendant knew that the stock of the Company was worthless because of the particular matters which the government charges.

VII.

The mere fact that any one of the defendants may have made statements which were false or misleading in order to induce others to purchase stock in this corporation, would not of itself justify you in finding him guilty of the crime of conspiracy as charged in this indictment unless you further find that the defendant made such statements knowing that the stock he was offering for sale was worthless.

VIII.

The mere assertion by a salesman that certain stock offered for sale was Company stock instead of personal stock would not justify you in finding such salesman guilty of the crime charged in this indictment. There is no difference between Company stock and personal stock, it is all stock in the United States Cashier Company, and if such salesman at the time of making such representations did not know or have knowledge of the matters which the government alleges rendered said stock worthless, but believed said stock to be valuable, then no presumption of fraudulent intent would arise and said defendant would not be guilty of the crime charged and you should find such defendant not guilty.

IX.

Gentlemen of the Jury: You are further instructed that an agent has the right to rely and act upon any statements made to him by his principal or employer without inquiry as to whether or not they are true, unless, of course, it is apparent from their face that they

cannot be true, and if an employer informs an employee that certain facts exist and are true and that certain representations or promises may be made or carried out, the agent has the right to repeat these statements to such person or persons whom he has a right to interest in his project without being responsible for them, even though it afterwards transpires that they are not true.

X.

You are further instructed that so far as the stock salesmen were concerned they were and are not officers of the Company and they stood in no fiducial relation toward its stockholders or toward such persons as it might be their duty in the course of their employment to endeavor to induce to purchase stock of the Company, and such salesmen had the right to freely contract with the Company and had the right to obtain the best contract they could for themselves without being guilty of fraud or wrong doing, and the mere fact, if you shall find it to be a fact, that they received a large commission, is not of itself any evidence of fraud or wrong doing on their part. They had a right to place whatever value they might desire upon their services and to obtain and make the best bargain they could with their prospective employers. The business of selling stock in a corporation or obtaining subscriptions to the same is a legitimate business and there is no presumption or suspicion of any kind against a man who engages in such business.

Exaggeration or puffing of the value of an article or enterprise does not constitute a crime and is not criminal

or fraudulent unless the person making such statements intends thereby to defraud the purchaser.

X-A.

There is no presumption from the fact that a statement is false that it was made with a fraudulent intent.

Southern Development Co. v. Silva, 125 U. S.
248.

XI.

It is incumbent upon the government to show that the representations or statements made by any one of the defendants were not only untrue but that the defendant knew them to be untrue, and in addition to those two elements intended thereby to injure and defraud.

XII.

There is no presumption of fraud from the fact that a glittering and glowing promise may have been made and not carried out, unless it shall appear that the person who made such promise knew at the time of making the same that it could not be carried out and would not be carried out.

(Signed) Robert F. Maguire,
Attorney for O. E. Gernert.

Whereupon the Court failed, neglected and refused to give instructions III, IV, VI, VII, VIII, X, X-A, XI and XII, to which failure and refusal of the Court an exception was granted to the defendant, O. E. Gernert.

And thereafter the Court instructed the jury in full as follows: which are all the instructions that the Court gave to the jury:

“You are to be congratulated that your labors in this case are about to end. You have sat here through a long and protracted trial, listening to the testimony and the arguments of counsel, and their construction and application of the testimony. I now ask your careful attention while I attempt to state to you the issues you are to determine and the rules of law by which you are to be guided in arriving at your verdict. When I have done this, the duty of the court in this case ends, and the responsibility rests with you.

“The defendants Frank Menefee, F. M. Lemonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell have been jointly indicted by the grand jury of this district charged with having entered into a conspiracy to commit an offense against the United States by violating what is commonly known as the Postal Fraud Statute. The defendants Hunter, Hopson, and Muraine are not on trial. The court has sustained a motion for a directed verdict as to the defendant Bilyeu, on the ground that no substantial testimony was offered by the Government to connect him with the conspiracy charged in the indictment, and therefore, whatever conclusion you may come to as to the other defendants, it will be your duty to return a

verdict of not guilty in favor of the defendant Bilyeu.

“The indictment is based on Section 37 of the federal penal code, which, for the purposes of this case, provides that, if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties thereto shall be guilty of a crime and punished accordingly. It is important, therefore, at the outset that you have a clear conception of what constitutes a crime under this section, and of the evidence necessary to establish it. I therefore repeat the statute: It is that, if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties thereto shall be guilty of a crime.

“You will observe that there are three essential elements necessary to constitute a crime under this statute. First, there must be the act of two or more persons conspiring and confederating together. One person cannot conspire with himself, and therefore there must be at least two persons acting together in order to constitute a conspiracy. Second, it must appear that the purpose of the conspiracy was to commit an offense against the United States, that is, to violate some law of the United States. And, third, one or more of the conspirators, after the conspiracy has been formed, must do some act to effect

the object thereof. Each of these elements is an essential ingredient of the crime charged, and must be established by the Government, to your satisfaction beyond a reasonable doubt, before you can find a verdict in its favor.

“Now, taking them up in their order: A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal and unlawful purpose, or some purpose not in itself unlawful or criminal by criminal or unlawful means. A common design is the essence of a conspiracy, and it is therefore necessary, in order to prove a conspiracy, for the Government to show a combination of two or more persons, by concerted action, to accomplish a criminal purpose. It is not necessary, however, for the Government to prove that such parties met together and entered into an explicit or formal agreement to that effect, or that they directly, by words or in writing, stated what the unlawful scheme was to be, or the details of the plan or means by which it was to be made effective. A conspiracy may be, and usually is, shown and proven by circumstances. Persons who contemplate committing a crime do not ordinarily place their intentions in writing, nor enter into any formal agreement for that purpose; but their agreement or understanding is generally to be determined from their acts and conduct and the entire circumstances surrounding their relationships and transactions.

"Guilty connection with a conspiracy may be established by showing association of the persons accused in and for the purpose of prosecuting the illegal object. It is enough if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the act and commit the offense charged, although such agreement be not manifested by formal words.

"While a conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons, on different occasions, did acts of a similar nature looking toward the same end or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention. The evidence must show that the parties accused, and each of them, agreed and confederated together to do the acts charged.

"Each party to a conspiracy must be actuated by the intent to promote the common design, but each may perform separate acts, or hold distinct relations, in promoting such design. Thus, if two persons pursue by their acts the same object, by the same means, one performing one part and the other another part, so as to complete it, with a view to attaining the object they are pursuing, that will be sufficient to constitute a conspiracy. Nor is it necessary that the conspirators should be acquainted

with each other, or that each should know the exact part to be performed by the other in the execution of the common design. It is enough if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose to accomplish that end, work together in any way in pursuance of the unlawful scheme, every one of such persons becomes a member of the conspiracy, although the part that he was to take therein was a subordinate one, and was to be executed at a remote distance from the other conspirators.

“Again, one who, after a conspiracy is formed, with knowledge of its existence, joins therein and aids and participates in its execution, becomes as much a party thereto from that time on as if he had been an original conspirator. Furthermore, where two or more persons are proven to have combined and confederated together for some illegal purpose, any act done by one of the parties, in furtherance of the common design and with reference to the common object, is in law the act of all, and therefore proof of such act will be evidence against any of the others who are engaged in the same conspiracy.

“It is also true that any declaration by one of the parties, in furtherance of the conspiracy or in execution thereof, during the pendency thereof, is not only evidence against himself, but evidence against

the other parties, who, when the conspiracy is formed, are as much responsible for such declarations and acts to which it relates as if made or committed by them. This rule applies to the declarations and acts of a conspirator although he may not be under prosecution or on trial. His declarations are equally admissible with those of the parties under indictment and being tried. But the declaration of a conspirator not in execution of the common design, or merely narrating past events, is not evidence against any of the parties other than the one making such declaration.

“One cannot be made a member of a conspiracy except by his own conscious act, and not by the acts and declarations of another.

“The second essential element of a conspiracy, so far as the case in hand is concerned, is that its purpose was to commit an offense against the United States.

“The law in force at the time it is alleged the conspiracy charged in the indictment was formed and existed provides that whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, shall, for the purpose of executing such scheme or artifice or attempting to do so, place or cause to be placed any letter, postal card, package, writing, circular, pamphlet, or advertisement in any postoffice, to be sent or delivered by the postoffice

establishment of the United States, shall be guilty of a crime and punished accordingly.

“It is this statute the defendants are charged with having conspired to violate.

“The postoffice establishment of the United States is a public agency, created and maintained by the Government at public expense for the convenience of all the people. It is important, therefore, that this agency should not be used for the purpose of promoting fraud, and Congress has passed the law to which I have called your attention prohibiting such misuse of the mails, and it is the duty of courts and juries to enforce this statute whenever and however violated.

“To devise, within the meaning of this statute, means to form a scheme, to lay a plan—to contrive. A scheme is a design or plan formed to accomplish some purpose. An artifice is an ingenious contrivance or device of some kind, and the term as used in the statute is equivalent to trick or fraud. To defraud implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something he already has. Fraudulent pretenses, representations, or promises mean such fraudulent suggestions or representations of an existing or past fact or promise as to the future, by one who knows

it not to be true, as are adapted to induce the person to whom they are made to part with something of value. It is necessary, therefore, that it should appear, to your satisfaction, from the testimony and beyond a reasonable doubt, that the conspiracy entered into by the defendants, if there was such a conspiracy, was to devise a scheme or artifice to defraud, or to obtain money or property by means of false and fraudulent pretenses or representations, to be effected by the postoffice establishment of the United States.

“The third essential element of the crime charged is that one or more of the conspirators should, after the conspiracy was formed and during its existence, do some act to effect the object thereof. And the act of one conspirator for this purpose is, in law, the act of all.

“With this general statement of the law, we come to a consideration of the specific charges against the defendants on trial, and upon which they are to be convicted or acquitted.

“The indictment, which forms the basis of the charge, after alleging the incorporation of the United States Cashier Company, with an authorized capital of \$1,200,000 divided into 120,000 shares, of the par value of \$10 each, and the official relation the several parties bore to such corporation, charges in brief that, on or about the first day of September, 1910, the exact date being to the grand

jury unknown, the defendants on trial and the other parties jointly charged with them conspired and confederated together to devise and execute a scheme to defraud, to be effected by means of the postoffice establishment of the United States, to obtain money and property, by means of false and fraudulent representations, pretenses and promises, from some 55 persons named in the indictment, and designated and referred to as "investors," and other persons to the grand jury unknown and the public generally, by inciting and inducing such persons to open correspondence with the defendants and the corporation, and to purchase from them and the corporation shares of stock in such corporation, paying over and delivering to the defendants in exchange therefor money and property; that such purchases were to be induced by means of false and fraudulent representations and statements by the defendants, in newspapers, pamphlets, catalogues, and letters, to be transmitted through the United States mails, and by words orally spoken, that the corporation owned patents to a certain change-computing machine, a bank cashier, a lightning change maker, a currency paying machine, and a new style adding machine; that the corporation was engaged in the business of manufacturing and selling such machines; that on account of its ownership of the patents and the manufacture of the machines, the shares of the capital stock of the corporation were of great value, and that large dividends would be paid thereon within six months from the date of the purchase of the stock; that the cor-

poration had a large number of bona fide orders for the purchase of machines, on account of which it would make a large profit; that the financial condition of the corporation was excellent, its assets largely exceeding its liabilities; that a certain amount of the stock offered for sale by the defendants belonged to the company, and that the money derived therefrom would belong to the corporation and be used by it to increase its assets, and particularly for increasing its manufacturing capacity; that by reason of the financial condition of the company, it was justified in increasing from time to time the selling price of its stock. It is further charged that it was a part of the conspiracy that the scheme to defraud should be carried out by the defendants, from time to time during its existence, fraudulently and designedly publishing and causing to be published false and untrue statements of the assets and liabilities of the company, and of its financial condition, in which it would be made to falsely appear that the assets were greatly in excess of their value and the liabilities less than the true amount thereof. It is further charged to have been a part of the conspiracy and scheme that the defendants should so manage and control the business of the corporation that more than 25 per cent of the money received from the sale of stock would be appropriated by them to their own use and benefit, and that, for the purpose of inducing persons to purchase stock, they would from time to time wrongfully and fraudulently increase the selling price thereof. It is then stated

that these proposed representations, statements, pretenses, and promises, except the ownership of the patent for the bank cashier, were untrue, and known to be such to the defendants and each of them, and were to be made for the purpose of cheating and defrauding the investors out of their money and property, and that the defendants well knew such investors would lose all the money invested by them. It is further charged that it was the understanding and agreement that the conspiracy was to, and did in fact, continue from September 1, 1910, to January 1, 1915, and that the defendants, and each of them, were parties thereto during that time.

“It is also alleged that, in pursuance of the conspiracy charged, and to effect the object thereof, the defendants Bonnewell, Menefee and LeMonn deposited and caused to be deposited in the United States mails, and for transmission thereby, certain letters and telegrams set out in the indictment, and which have been referred to throughout the trial as the overt acts.

The defendants have each entered a plea of not guilty. This plea is a denial of every material allegation in the indictment, and imposes upon the Government the burden of proving each and all of these to your satisfaction, beyond a reasonable doubt, before you will be justified in returning a verdict in its favor.

“Now, the material allegations in brief are, first, that there was a conspiracy, agreement, or under-

standing upon the part of the defendants; second, that such conspiracy was to devise the particular scheme to defraud set out in the indictment; and, third, that it was a part of the understanding and agreement that the postoffice establishment of the United States was to be used for the purpose of executing the scheme. It is therefore incumbent on the Government to prove, not only that the defendants conspired together to devise the particular scheme set out in the indictment, but that it was a part of such agreement or conspiracy that the scheme should be executed by the use of the postoffice establishment of the United States; and if as to any one or more of the defendants the Government has failed to prove any one or more of the elements necessary to constitute the crime charged, it is your duty to find such defendant or defendants not guilty.

“The jurisdiction of this court over this case is because of the charge that it was a part of the alleged conspiracy or agreement that the scheme, if there was a fraudulent scheme, should be executed by the use of the United States postoffice establishment. This court does not have jurisdiction to punish persons for entering into fraudulent schemes or devices, nor for committing frauds, unless it is a part of their agreement that the United States mails should be used in carrying them into effect. Therefore, even though you should find that the defendants did agree together to devise a scheme to defraud, it would not be sufficient to justify their conviction unless it also appears that

it was a part of such conspiracy that the United States mails should be used for executing it. And even if injury resulted from the acts of one or more of the defendants, brought about and executed in whole or in part by the use of the mails, it would not justify a conviction of such defendant or defendants unless it further appeared that the original agreement or understanding contemplated the use of the mails in furtherance of their common purpose.

“The indictment charges that the alleged fraudulent scheme was to be carried out and executed by certain specific false representations. It is not incumbent upon the Government to prove that all of the means set out in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that any of them were actually used or put into operation. It is sufficient if it be shown to your satisfaction, beyond a reasonable doubt, that the conspiracy was entered into for the purposes indicated, and that one or more of the means described in the indictment were to be used to execute it, and that, during the continuance of the conspiracy, the alleged overt acts, or some one or more of them, stated in the indictment were done by one or more of the conspirators to effect the object thereof.

“It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned

patents to the certain coin machines heretofore mentioned, when in truth and in fact they did not own such patents. If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they purposed to manufacture, and such representations were false and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any wilful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent, and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or af-

fectured injuriously by the Osborne and Lindelof or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent purpose, even if material, are not fraudulent. As I understand the testimony, it is admitted that, at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case.

“It is also charged in the indictment that other proposed means of carrying out the fraudulent scheme were to falsely represent that the United

States Cashier Company was engaged in the business of manufacturing and selling these coin machines; that the company had a large number of bona fide orders for the purchase of machines, and that the financial condition of the company was excellent, and such as to justify increasing from time to time the selling price of the stock, and that certain stock to be offered for sale belonged to the company, and the money derived therefrom would belong to the company, and be used by it, and become a part of its assets, and be used in its manufacturing business. If these representations, or any of them, were agreed to be made, and were false and known to be such to the defendants, and were to be made for the purpose of deceiving the public, they would constitute schemes to defraud within the meaning of this statute.

“Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the charge that the company was not intending to engage in either the business of manufacturing or selling such machines.

“With reference to the evidence that the price of the stock was raised at intervals, if you find that

it was done in the honest belief at the time that the progress of the affairs of the company justified such raise, and that the stock was of the value of the increased price, though such belief may not have been justified by the then condition of the enterprise as indicated by subsequent events, you cannot find the defendants guilty because they proved to be mistaken about that.

“The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declarations were made, and as they

appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions.

“To constitute a scheme to defraud, to be carried out by the use of the United States mails, it is not necessary that the scheme should be fraudulent on its face. Although apparently a legitimate business, it is within the statute if there was an intent not to conduct the business honestly, but to use it as a basis to defraud.

“The indictment, after setting out the conspiracy and the purpose thereof, and the means to be used to effect the same, alleges that, in furtherance thereof and for the purpose of effecting its object, certain letters were mailed by the defendants Bonnewell, LeMonn and Menefee, and sent through the United States mails to the parties named in the indictment, and these constitute what have been referred to throughout the trial as the overt acts or the acts done by one or more of the conspirators to effect the object thereof. This is an essential allegation, and must be proven by the Government. A conspiracy alone does not constitute a crime, but one or more of the conspirators must, after its formation, do some act to effect the object thereof. It is not necessary for the Government to prove each of these acts. If you are satisfied, beyond a reasonable doubt, that one or more of the letters set out in the indictment were sent by one of the conspirators, if there was a conspiracy, after its forma-

tion and during its existence, to effect the object thereof, that is all the law requires. And in determining whether the letters set out were sent by one of the conspirators to effect the object of the conspiracy, if one was formed, you should consider the character of the letters, the purpose to be accomplished thereby, and all the circumstances bearing upon that question, and from that determine what the object and purpose was in sending the letter or letters through the mails.

“The indictment also charges that it was the purpose or intent of the defendants to defraud the persons named in the indictment, and the public generally, out of their money. The law presumes that every person intends the natural and probable consequence of his own act, and if you believe from the evidence, and beyond a reasonable doubt, that the defendants, or any two of them, conspired to do the things named in the indictment, substantially in the manner and form as therein set out, and that it was the natural and probable consequence of their acts that purchasers of stock of the Cashier Company would be defrauded, then you would be justified in finding that it was the intent of such defendants so entering into the conspiracy, if there was a conspiracy, to defraud the persons named.

“In order for one person to defraud another, it is not necessary that he should bear any malice or illwill toward such person. If the defendants in this case agreed together that they were to sell the

shares of stock in this corporation upon and on account of false and fraudulent representations, which they would make knowing these representations would be false and untrue, and knowing that they would be made for the purpose of deceiving the investors and the public as to the true condition and value of the shares of stock, then the law would imply that they intended to defraud all of the persons who should buy shares of stock from them, or from the Cashier Company, relying upon such representations.

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the

circumstances agree to make in order to induce the investors and the public to pay over their money.

“In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent.

“The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally

into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception.

“The law presumes that every man intends the logical and natural consequences of his own wrongful act. Applying this rule to the case at bar, if you believe from the evidence, and beyond a reasonable doubt, that these defendants agreed among themselves that they would sell to the public and to these investors the shares of stock of the United States Cashier Company, under the false and fraudulent representations set out in the indictment, or some of them, then you would be justified in finding that the defendants agreed to defraud the investors and the public, notwithstanding the fact that you also might believe that the defendants really believed that the value of the stock would be ultimately such as to return to the investors a profit instead of a loss.

“It is not necessary in this case, in order to convict one or more of the defendants, that you should be satisfied that each of the defendants knew or understood all of the fraudulent representations, promises, or pretenses that were to be made, if any were to be made. If one of these defendants, at any time prior to the period of three years from the date of filing the indictment, and prior to the time when any overt act set out in the indictment was com-

mitted, agreed with another of said defendants that they would act jointly in carrying out the alleged fraudulent scheme set out in the indictment, and in selling the stock of the corporation representing that the money to be received from such sale was to go into the treasury of the company to be used by it in building factories, knowing that the shares of stock which were to be offered for sale were in truth and in fact the privately owned stock of another of the defendants, and that none of the money would go into the treasury of the company, and you further believe from the evidence that some of the false and fraudulent pretenses and promises set out in the indictment were to be used by the defendants for the purpose of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell the stock in said manner and under such false representations were parties to the conspiracy.

“If you believe from the evidence that the original purpose of the defendants was legitimate, and you further believe from the evidence that they believed in the future of the United States Cashier Company and believed that it would ultimately pay dividends to the investors, and you believe from the evidence and beyond a reasonable doubt that they deliberately agreed together to take advantage of the public interest in a meritorious invention in order to sell to the public shares of stock by the false and fraudulent representations set out in the indictment, if they were false, then you would be

justified in finding that the defendants intended to defraud the persons to whom they should sell such stock.

“In determining whether or not the defendants intended to defraud the investors of the money by selling to them the shares of stock of the corporation, you have a right to take into consideration the question of the commissions which the evidence shows, or tends to show, were received by the defendants, or any of them, from the proceeds of the sale of the stock.

“Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial

corporation to open and fair dealing was to be invaded, and that such fraud was to be accomplished by any of the means set out in the indictment, and that the letters sent by one or more of the conspirators and referred to in the indictment were written and mailed to effect the object of the conspiracy and in furtherance thereof. The formation of the corporation and the sale of stock therein is not itself criminal or wrongful, provided no deception or fraud is used to induce persons to make such purchases. The defendants, therefore, are not to be found guilty merely for selling or offering for sale stock in the corporation, although it may have proven an unprofitable investment to the purchaser, nor for mere mistakes or errors in judgment. And there is no presumption of fraud from the fact that glittering and glowing promises may have been made and not carried out, unless it shall appear that the persons who made such promises knew at the time of making same that they could and would not be carried out.

“The indictment charges that the conspiracy was formed in September, 1910. The date is not material. It is sufficient if it was formed sometime prior to the overt acts charged in the indictment, and continued and was in existence at the time of such acts.

“Now, if you are not satisfied from the evidence, beyond a reasonable doubt, of the existence of the conspiracy as charged in the indictment, or if you

have a reasonable doubt in that matter, you should return a verdict of not guilty as to all the defendants. If, however, on the other hand, you do believe beyond a reasonable doubt that the conspiracy was formed in manner and form as stated in the indictment, it will be necessary for you to determine who were the parties to such conspiracy. If there was a conspiracy as claimed by the Government, it would seem from the evidence that Menfee and LeMonn must be parties thereto. Menfee was the president and general manager of the company, and LeMonn was the sales manager, and together they had charge of the stock-selling campaign. Whether these two parties conspired and confederated together to defraud purchasers of stock in the manner and form as set out in the indictment is a question for you to determine from the testimony. And whether any of the other defendants were parties to the conspiracy, if you find one existed, is to be determined from the evidence offered against them. Before they, or any of them, can be convicted, it must appear that they were parties to the conspiracy set out in the indictment, and they cannot be convicted on evidence that they devised or were parties to some other conspiracy not charged.

“Gernert, Bonnewell and Todd were sales agents of the company, engaged in selling the corporate stock in pursuance of an agreement with the officers of the corporation. Their connection with the alleged conspiracy cannot be established, as to any of them, by the acts and declarations or

statements of the other defendants, made without their knowledge. One cannot be made a member of a conspiracy except by his own acts or declarations, and the acts and declarations of another are not evidence against him.

“Numerous letters have been offered and read in evidence, written or purporting to have been written or dictated by the defendants Menefee and LeMonn, and addressed to divers and sundry persons. These letters, if they contain statements tending to establish a conspiracy, are competent evidence to be considered by you as against the writer; but no statements made therein are to be taken as evidence against the other defendants not connected with such letters. The connection of the other defendants with the conspiracy must be determined from their own acts and conduct, and not from the declarations of the other alleged co-conspirators. Before either of the sales agents can be convicted, you must be satisfied, beyond a reasonable doubt, that the conspiracy existed as charged in the indictment, that they knew of its existence and purpose, and, with full knowledge thereof, joined therein with the purpose and intent of assisting in its accomplishment. Mere suspicion or conjecture that they were connected with an unlawful combination, if there was such a one, is not enough. All the facts necessary to make them conscious participants therein must be shown before you can find them guilty. If they acted in good faith, relying upon the representations and statements of their superior

officers, believing them to be true, they should not be convicted because they repeated such statements to intending purchasers.

“If, however, you find from the evidence that a conspiracy was entered into and existed as alleged in the indictment, and that, after its formation and while it was in existence, the defendants Gernert, Bonnewell and Todd, or either of them, became willing parties thereto and assisted in carrying it out, they would continue to be parties thereto and bound by every act in furtherance thereof until such time as they should, by some act of their own, withdraw therefrom. To withdraw from a conspiracy after entering into it requires an affirmative action of withdrawing. If one willingly assists in starting evil forces into operation, he must affirmatively withdraw his support from them, or he must suffer the consequences of incurring guilt by those connected therewith; and until he does so withdraw there is conscious offending. These sales agents had a right to rely and act upon any statements made to them by their principal or employer, without inquiry as to whether they were true or false, if they honestly believed them to be true, unless, of course, it is apparent upon their face that they could not be true, and if an employer informs an employe that certain facts exist and are true, and that certain representations or promises may be made or carried out, the agent has a right to repeat these statements to such person or persons whom he had a right to interest in his project, with-

out being criminally responsible for them, even though it afterwards transpires that they are not true. And it is not sufficient in this case for the Government to show certain acts of these sales agents, or that these agents performed certain acts, and that one or more of the other defendants performed other and different acts, even though they had a similar purpose in view, unless it further appears that there was a common concert of action between them and an agreement so to act. These sales agents were not officers of the Cashier Company, and stood in no fiduciary relation toward its stockholders, or such persons as might become such stockholders. They were mere salesmen, and therefore had a right to make such a contract or agreement with the officers of the company concerning their own compensation as they were able to make, provided it was done in good faith, and with no intention to enter into any conspiracy that existed, if there was one.

“It is claimed as against both Gernert and Todd that they sold private stock, representing it to belong to the company and that the money derived therefrom would go into the treasury of the company, when in truth and in fact they appropriated the money to their own use, and the stock belonged to parties other than the corporation. Now, neither of these acts would constitute a crime within this indictment, unless you believe from the testimony, beyond a reasonable doubt, that these gentlemen knew of the alleged conspiracy, and that it was a

part of such conspiracy that private stock should be sold as the stock of the corporation and upon a representation that the money derived therefrom should go into the treasury of the company.

“Again it is claimed, on behalf of Todd, that he severed his connection with this company some time early in 1912, and abandoned his previous relations with it, and therefore withdrew from the conspiracy, if there was a conspiracy at that time. Now, if that is true, or if you have a reasonable doubt upon that subject, then the fact that he subsequently, some year or two later, sold on his own account stock which he had purchased from one of the officers of the company, representing that it was company stock or that the money derived therefrom would go into the coffers of the company, would not justify a verdict of guilty as against him under the indictment now under consideration. And this same statement would apply to the defendant Bonnewell. Before either of these, or any of these defendants can be convicted, it must appear that they were parties to the conspiracy charged in the indictment, and that their acts were done in pursuance thereof and in furtherance of such conspiracy.

“Now, gentlemen, this is a criminal case. The defendants have each entered a plea of not guilty, and, as I have said to you, that imposes upon the Government the duty of proving every material allegation necessary to constitute the crime, to your

satisfaction beyond a reasonable doubt, before you can convict.

“When I have said heretofore in these instructions that a certain fact must be established by the Government, or a certain fact must be proven before you are justified in finding a verdict of guilty, I have meant always that it must be proven to your satisfaction beyond a reasonable doubt.

“The defendants, and each of them, are presumed to be innocent of this charge. This presumption is not a mere fiction which can be disregarded at pleasure. It is a substantial part of the criminal law of the country, and continues and abides with the defendants throughout the trial until overcome by the testimony. They are not required by law to prove their innocence. The burden is upon the Government to prove their guilt, and that beyond a reasonable doubt.

“By a reasonable doubt I do not mean a mere possible doubt, a mere captious doubt, but such a doubt as would cause a reasonably prudent man to hesitate to act in his own most grave and important affairs. It is not such a doubt as a juror might conjure up in his own mind, without any substantial basis for it, but it is a doubt founded either on the evidence or want of evidence, and is that state of the case which leaves your minds in such a condition that, after a careful consideration of all the testimony, you cannot say you feel an abiding conviction, to a moral certainty, of the guilt of the defendants.

If you do so hesitate, you should give the defendants the benefit of it, and an acquittal. If, on the other hand, however, after an entire comparison and consideration of all the evidence, you feel an abiding conviction, to a moral certainty, of the guilt of the defendants, or any of them, under the law as I have given it to you, you should so declare in your verdict.

“You are the exclusive judges, gentlemen, of the credibility of the witnesses and the weight to be given to their testimony. You are also the exclusive judges of all questions of fact, and if at any time during the trial the court has intimated its views concerning any disputed question of fact, or the testimony of any witness, you are to disregard it unless it conforms to your own understanding.

“Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which a witness testified by his appearance on the witness-stand, or by contradictory testimony.

“The defendant Menefee has availed himself of the right given him, and testified in his own behalf. His testimony is before you, and you are to determine how far it is credible, and to apply to it the same rule and test that you apply to the testimony of any other witness who has been called in this case, keeping in mind, however, the deep interest which he has in the result of the trial.

“The other defendants have not testified, and no inference or presumption is to be drawn against them on that account.

“Now, there has been considerable said during this trial about the sale or transfer of the property or part of the property, of the United States Cashier Company to an Indiana corporation. The defendants are not on trial for that transaction, and whatever you may think about it, you would not be justified in convicting them in this case on its account. The proof in reference to it was a circumstance in the case, developed during the trial, and it is proper for you to consider for whatever you may think it is entitled to as explaining or supporting the charges made in the indictment.

“During the trial a witness by the name of Baker was called and testified. During his examination certain letters were produced, written to him by one of the officers of the corporation, not involved in this controversy however, and I desire to caution you again about giving any weight as evidence to any statements contained in those letters. They were used solely and entirely for the purpose of impeaching, or tending to impeach, Mr. Baker by showing that he had made statements out of court inconsistent with his testimony given on the trial. For that purpose they were used, and for no other, and any statements or declarations that Mr. Baker may have made in these letters concerning any of the defendants on trial, or any of the issues involved in this

case, or any matters you are to consider, should be entirely disregarded by you, because the guilt or innocence of one individual cannot and ought not to be determined by the declarations of some third party.

“The indictment in this case charges but one conspiracy, although there are numerous overt acts alleged, and therefore the requirements of the law will be satisfied by a general verdict, without passing upon each of the particular overt acts. I think there is no controversy but what they were all proven except two or three; but in any event, proof of one or more of the overt acts, done by a conspirator, would be sufficient to support that averment in the indictment.

“Your verdict, gentlemen, must be unanimous, and after you retire to the jury room you will select one of your number as foreman, who will sign any verdict that you may return.

“During the progress of this trial the court overruled or denied a motion for a directed verdict as to three of these defendants—Gernert, Bonnewell and Todd. You are not to infer from that, gentlemen, that in the opinion of the court there was evidence sufficient to convict these three gentlemen. It is the duty of the court to determine questions of law and of the jury to pass upon all questions of fact, and therefore, when the court denied the motion for a directed verdict, it simply held that, in its opin-

ion, there was some evidence, sufficient to carry this case to the jury, and to call upon the jury to determine whether it was enough to show that these defendants were guilty of the crime charged against them, and you are to draw no inference against the defendants because of the action of the court in overruling such motion.

“Now, gentlemen, it is needless for me to remind you that this is a case of importance, both to the Government and to the defendants. Take it—consider all the facts and circumstances in evidence before you—consider it carefully and dispassionately, with an eye single to reaching a just conclusion, and return a verdict according to the law and the facts as you understand them.

“There are three forms of verdict that you can return in this case: One is a verdict of not guilty as to all the defendants. Another is a verdict of guilty as to all the defendants except the defendant Bilyeu, and as to him your verdict shall be not guilty. And the third is a verdict of guilty as against two or more of the defendants, and not guilty as to the others. Forms have been prepared which you may adopt, or use these or similar forms, filling in the necessary blanks.

“Mr. Pipes: There are a few verbal matters I would like to call your Honor’s attention to. In the instructions concerning a conspiracy, that it may be a conspiracy to do a criminal act, or an innocent

act by unlawful means. I take it that in this case it must be the first.

“Court: Yes, in this case it must be the conspiracy to commit the particular crime charged in this indictment.

“Mr. Pipes: Yes. Now, in one of the definitions of a conspiracy, your Honor, as I remember it and heard it, in naming a number of means or number of acts committed by several persons independently tending to the same end, that it constituted a conspiracy. I think that would be correct if it were modified to say that it is evidence.

“Court: I didn’t intend to say constituted, if I said it. I intended, of course, to say that it was evidence of the conspiracy.

“Mr. Pipes: That, of course, then will be corrected, as far as that is concerned?

“Court: Yes.

“Mr. Pipes: Now, as to another one: In commenting on the subject of overt acts, your Honor evidently, it is perfectly plain to me, was speaking of the overt acts, but the word “overt” was left out. I think they just ought to understand that no act in evidence in this case is an overt act except one of those described and set out in the indictment.

“Court Yes, I will make that clear to the jury, if I didn’t do that. Gentlemen, the indictment in this case charges that certain letters set out and de-

scribed in the indictment were sent by the parties named, through the United States mails, in furtherance or in execution of the alleged conspiracy; and these letters constitute the overt acts, and no other act could constitute an overt act except those stated in the indictment."

To the following instructions of the Court so given the defendant, O. E. Gernert, took exception, which exception was duly granted and allowed by the Court:

Again, one who, after a conspiracy is formed, with knowledge of its existence, joins therein and aids and participates in its execution, becomes as much a party thereto from that time on as if he had been an original conspirator. Furthermore, where two or more persons are proven to have combined and confederated together for some illegal purpose, any act done by one of the parties, in furtherance of the common design and with reference to the common object, is in law the act of all, and therefore proof of such act will be evidence against any of the others who are engaged in the same conspiracy.

The indictment charges that the alleged fraudulent scheme was to be carried out and executed by certain specific false representations. It is not incumbent upon the government to prove that all of the means set out in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that any of them were actually used or put into operation. It is sufficient if it be shown to your satisfaction, beyond a reasonable doubt, that the conspiracy was entered into for the purposes indicated,

and that one or more of the means described in the indictment were to be used to execute it, and that, during the continuance of the conspiracy, the alleged overt acts, or some one or more of them, stated in the indictment were done by one or more of the conspirators to effect the object thereof.

In order for one person to defraud another, it is not necessary that he should bear any malice or ill-will toward such person. If the defendants in this case agreed together that they were to sell the shares of stock in this corporation upon and on account of false and fraudulent representations, which they would make knowing these representations would be false and untrue, and knowing that they would be made for the purpose of deceiving the investors and the public as to the true condition and value of the shares of stock, then the law would imply that they intended to defraud all of the persons who should buy shares of stock from them, or from the Cashier Company, relying upon such representations.

It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and

assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.

In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business of the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representation which they would have agreed to make would be for the purpose of getting the money in a wrongful way and they could not, under such circumstances make them rightful by pointing to some ultimate good intent.

The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without

loss; but his taking is wrongful and his intent to pay it back without loss cannot cancel the wrong. So in this case if the defendants by means of the false and fraudulent representations set out in the indictment agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit could not condone the wrong in getting the money by deception.

The law presumes that every man intends the logical and natural consequences of his own wrongful act. Applying this rule to the case at bar, if you believe from the evidence, and beyond a reasonable doubt, that these defendants agreed among themselves that they would sell to the public and to these investors the shares of stock of the United States Cashier Company, under the false and fraudulent representations set out in the indictment, or some of them, then you would be justified in finding that the defendants agreed to defraud the investors and the public, notwithstanding the fact that you also might believe that the defendants really believed that the value of the stock would be ultimately such as to return to the investors a profit instead of a loss.

It is not necessary in this case in order to convict one or more of the defendants that you should be satisfied that each of the defendants knew or understood all of the fraudulent representations, promises or pretenses that were to be made, if any were to be made. If one of the defendants at any time prior to the period of three years

from the date of filing the indictment and prior to the time when any overt act set out in the indictment was committed agreed with another of said defendants that they would act jointly in carrying out the alleged fraudulent scheme set out in the indictment, and in selling the stock of the corporation representing that the money to be received from such sale was to go into the treasury of the company to be used by it in building factories, knowing that the shares of stock, which were to be offered for sale, were in trust and in fact the privately owned stock of another of the defendants and that none of the money would go into the treasury of the Company, and you further believe from the evidence that some of the false and fraudulent pretenses and promises set out in the indictment were to be used by the defendants for the purpose of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell their stock in such manner and under such false representation, were parties to the conspiracy.

If you believe from the evidence that the original purpose of the defendants was legitimate, and you further believe from the evidence that they believed in the future of the United States Cashier Company and believed that it would ultimately pay dividends to the investors and you believe from the evidence and beyond a reasonable doubt that they deliberately agreed together to take advantage of the public interest between a meritorious invention in order to sell to the public shares of stock by the false and fraudulent representations set out in the

indictment, if they were false, then you would be justified in finding that the defendants intended to defraud the persons to whom they should sell such stock.

In determining whether or not the defendants intended to defraud the investors of the money by selling to them the shares of stock of the corporation, you have a right to take into consideration the question of the commissions which the evidence shows, or tends to show, were received by the defendants or any of them, from the proceeds of the sale of the stock.

Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of direct or circumstantial evidence, the aid of which is constantly required not merely for the purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, great latitude is allowed in its admission, for the reason that the force and

effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered may, by their number and joint operation established or corroborated by minor circumstances be sufficient to constitute conclusive proof. And where fraud in the purchase or sale of property is in issue, evidence of frauds of like character committed by the same parties at or near the same time, is admissible, on the ground that where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceed from the same motive.

The indictment charges that the conspiracy was formed in September, 1910. The date is not material. It is sufficient if it was formed some time prior to the overt acts charged in the indictment and continued and in existence at the time of such acts.

Whereupon the jury duly retired to consider their verdict and thereafter returned a verdict into court finding the defendant, O. E. Gernert, guilty as charged in the indictment, which said verdict was duly filed.

Thereafter the defendant, O. E. Gernert, moved the court as follows:

Comes now O. E. Gernert, by his attorney, Robert F. Maguire, within the time allowed by court, and moves the court for a new trial on behalf of the said defendant, O. E. Gernert, upon the following grounds and for the following reasons:

I.

That the indictment does not state facts sufficient to constitute a crime.

II.

That the indictment charges more than one crime.

III.

That there is no evidence tending to show any confederation, agreement or conspiracy on the part of the defendant, O. E. Gernert, with the defendants named in the indictment or any of them.

IV.

That the verdict of the jury was against the law as laid down by the court.

V.

That the court erred in giving certain instructions to the jury which were duly excepted to by the defendant, O. E. Gernert.

VI.

The court erred in failing to give certain instructions to the jury as requested by the defendant, O. E. Gernert.

VII.

The court erred in modifying certain instructions requested by the defendant, which modification was duly excepted to.

VIII.

The court erred in various rulings upon the law and evidence, which were duly excepted to by the defendant, O. E. Gernert, at the time of the trial.

IX.

That the court erred in refusing to instruct the jury to find the defendant, O. E. Gernert, not guilty.

(Signed) Robert F. Maguire,
Attorney for defendant,
O. E. Gernert.

Thereafter the defendant, O. E. Gernert, moved the court for an arrest of judgment as follows:

Comes now the defendant, O. E. Gernert, by his attorney, Robert F. Maguire, and moves the court for an order and arrest of judgment in said case on behalf of the said defendant, O. E. Gernert, upon the following grounds and for the following reasons:

I.

That it appears from the evidence in said case and the stipulation of counsel that the object of the conspiracy had been effected more than three years prior to the filing of the indictment.

II.

That the record in said case shows that as to the defendant, O. E. Gernert, the statute of limitations has run.

III.

That the indictment does not state facts sufficient to constitute a crime.

IV.

That the court erred in refusing to instruct the jury to find the defendant, O. E. Gernert, not guilty.

V.

That there was no evidence connecting the defendant, O. E. Gernert, with the conspiracy set out in the indictment.

VI.

That the evidence affirmatively shows that the defendant, O. E. Gernert, was not confederating, associating, connected or acting with the defendants for more than three years prior to filing the indictment.

VII.

That there is no evidence tending to show that the defendant, O. E. Gernert, had any fraudulent intent.

VIII.

That there is no evidence tending to show that the defendant, O. E. Gernert, confederated, conspired or concurred with the defendants or any of them in the offense charged in the indictment.

IX.

The court erred in giving certain instructions to the jury, all of which were duly excepted to by the defendant, O. E. Gernert.

X.

The court erred in failing to give certain instructions requested by the defendant, which were excepted to by the defendant, O. E. Gernert, at the proper time and place.

XI.

That the court erred in modifying certain instructions requested by the defendant O. E. Gernert, which modifications were excepted to by the defendant, O. E. Gernert, at the proper time and place.

XII.

That the verdict of the jury was contrary to the instructions of the court and contrary to law.

XIII.

That there was no evidence tending to connect the defendant, O. E. Gernert, with the crime alleged in the indictment.

XIV.

That the court erred in various rulings in law and evidence, which were duly excepted to by the defendant, O. E. Gernert, at the proper time and place.

XV.

That the District Attorney was guilty of misconduct in the cross-examination of the witness, Edward Baker, which conduct was excepted to by the defendant, O. E. Gernert, at the proper time and place.

XVI.

That the court erred in not instructing the jury to disregard all testimony of the witness, Oviatt, relative to his alleged claim of priority of invention of the selector bar and which was known throughout the trial as the Bilyeu Invention.

Thereafter the court heard the arguments of counsel upon said motions and overruled the same, to which action of the court the defendant, O. E. Gernert, was duly allowed an exception.

Thereafter the court entered a judgment of conviction and sentenced the defendant, O. E. Gernert, to confinement in the Multnomah County jail, Portland, Oregon, for a period of four months.

Thereafter and within the time allowed by court the defendant, O. E. Gernert, presented this, his Bill of Exceptions, which is hereby duly allowed.

R. S. BEAN,
Judge.

Filed March 29, 1916.

G. H. Marsh, Clerk.

And afterwards, to wit, on the 29th day of March, 1916, there was duly filed in said Court and cause a Petition for Writ of Error in words and figures as follows, to wit:

PETITION FOR WRIT OF ERROR.

Now comes O. E. Gernert, defendant in the above-entitled cause, and brings this his Petition for a Writ of Error to the District Court of the United States for the District of Oregon, and respectfully shows:

That on the 25th day of October, 1915, there was rendered and entered in the above-entitled court a judgment and sentence against him, the above-named defendant, whereby said defendant was adjudged and sentenced to be imprisoned for the term of four (4) months in the Multnomah County Jail, Portland, Oregon, in which judgment and sentence against said defendant, and in the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of said defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition.

WHEREFORE, said above-named defendant prays that a Writ of Error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that all further proceedings in the above-entitled District

Court be suspended, stayed, and superseded, and that sentence and execution herein be stayed until the final disposition of said Writ of Errors in said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 28th day of March, 1916.

LITTLEFIELD & MAGUIRE,

Attorneys for Defendant,

O. E. Gernert.

Filed March 29, 1916.

G. H. Marsh, Clerk.

And afterwards, to wit, on the 29th day of March, 1916, there was duly filed in said Court and cause an Assignment of Errors in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

O. E. Gernert, defendant in the above-entitled action, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a Writ of Error from this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and entered in said cause, against said plaintiff in error, and petitioner herein, now makes and files with his said petition the following assignment of errors herein upon which he will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon him by law; and he says that in the record

and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the District of Oregon there are manifest errors in this, to-wit:

I.

That the Court erred in admitting in evidence against the defendant, O. E. Gernert, Government's Exhibit 293, being a carbon copy of a letter dated Portland, Oregon, February 10, 1912, addressed to O. E. Gernert at Portland, Oregon, as follows:

"Portland, Oregon, February 10th, 1912.

Mr. O. E. Gernert,

Portland, Oregon.

Dear Sir:—

In reference to our understanding in regard to your selling stock in California territory, will say that we will make you the following proposition: You are to work in the territory from San Francisco south toward Los Angeles, keeping at a distance from said latter place, so as not to interfere with the territory or work of our Agent there, and you are to have working under you such men as you may mutually arrange for, and after the first advancement to any of the men working under you, no further advancement shall be made to any of them, except through you.

All men working under you shall receive a commission of fifteen (15%) per cent, providing the business done by them shall not equal or exceed the

sum of One Thousand Five Hundred (\$1,500.00) Dollars per month; twenty (20%) per cent if the business done by them shall exceed One Thousand Five Hundred (\$1,500.00) per month and shall not exceed Three Thousand (\$3,000.00) Dollars; and twenty-five (25%) per cent if the business done by them in any one month shall exceed the sum of Three Thousand (\$3,000.00) Dollars; these commissions to be allowed and rated only on cash business done by each of your men respectively.

On all the business done by your men where settlement is made in paper, and either notes or contracts taken only a fifteen (15%) per cent commission shall be allowed, and no paper shall be taken to run longer than ninety (90) days provided where settlement is made for purchases of stock by note, if you or your agent shall succeed in discounting said note without recourse, so that the proceeds shall be received by us within ten (10) days after the close of the month in which the sale of the stock is made for which said note is taken in settlement, same shall be credited back as cash business for the month in which the subscription was taken. The commissions on settlements made by note or contract or in any manner other than cash, shall only become due and payable when the money is received by us for the sale or collection of said note or contract.

The above terms shall apply to any business done by you personally without the aid of assistance of an agent.

It is understood and agreed that you shall be entitled to receive an over-head commission on all business done by you or your agents of five (5%) per cent, and your commission shall be due and payable as that of the Agents, or in other words, on cash received, or on notes negotiated without recourse or collected.

We will advance to you for your personal expenses the sum of Twenty-five (\$25.00) Dollars per week, and pay you in addition to the above commission, a salary of Fifty (\$50.00) Dollars per week, it being understood that the Twenty-five (\$25.00) Dollars per week expense money shall be returned to us or deducted from your commissions as earned.

No settlement shall be made by you or any of your Agents on cash business turned in to you or through you to us, except the minimum commission of fifteen (15%) per cent on cash received, which you may retain and pay to the agents as the cash is received by you, and the bonuses or extra commissions, if any shall accrue to any agent, shall only be settled ten (10) days after the close of the month, when the volume of business done by each person working under you, shall be finally ascertained.

It is understood that in all sales made by you or your organization, you shall have the right to turn your own personal stock for one-fourth ($\frac{1}{4}$) of all such sales; that the turning over by you of the stock to the amount of one-fourth ($\frac{1}{4}$) of all of the net

proceeds, less your commissions, agents' commissions, and other expenses incurred in the selling of the stock which you shall dispose of.

In consideration of allowing you to dispose of one-fourth ($\frac{1}{4}$) of the stock handled by you, from your personal stock, you are to bear one-fourth ($\frac{1}{4}$) of the expense of your own salary, sales commissions, and other expenses, it being understood that our agreement to pay to you the salary mentioned, and advance to you the money as above stated, is to be considered only as a loan to the extent of the advancement of the Twenty-five (\$25.00) Dollars per week, and one-fourth ($\frac{1}{4}$) of your salary.

With reference to all notes taken by you, it is understood that you shall, where you leave same with a local bank for collection, take a receipt from said bank, particularly describing the note, the returns and commissions to be allowed for the collection and so deposit the same that the proceeds will be at once accounted for and remitted to the undersigned by said bank.

Yours faithfully,

No. 3.

F.M.:MM

over the objection of the defendant **Gernert**.

II.

The Court erred in overruling an objection of the defendant Gernert to the following testimony of the witness Oviatt on his direct examination:

“That he had devised the principles of a coin paying and (in the summer of 1909) had gone to Mr. Glover, a public engineer with a view to having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results, and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas, and Bilyeu was to proceed with the development and put it into working shape, and build a model. That the witness had disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod, so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position. That Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided sixty per cent to the witness and forty per cent to Bilyeu, and that was agreeable to witness, and that they shook hands on it. That Mr. Bilyeu said to him, “I will take you out to my model maker,” which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin and said that the witness had been associated with Mr. Potter in the development of the machine, and had not been treated properly by Mr. Potter; that witness had de-

vised a machine of his own and arranged with Bilyeu to develop it, and wanted Overlin to undertake the manufacture of a model; that Mr. Overlin accepted, and they returned to town. That Mr. Bilyeu advertised for a draftsman, and put him to work in the Ainsworth Building; that the model was constructed and that a month or six weeks after that time Mr. Bilyeu said to the witness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for witnesses to make a better machine, and that Mr. Bilyeu said he could not do it. That the witness went east the 2nd day of May, 1910, and went first to the Comptograph Company, with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine. That he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910; that the second model was completed in 1912.

The witness was then shown photographs of the exterior of the machine, and identified them as photographs taken in August, 1910, and of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company.

II A.

That the Court erred in permitting the witness to testify relative to and demonstrating the latest Payograph machine to the jury over the objection of the defendant Gernert as follows:

Q. Will you take that machine and demonstrate it to the jury? (Witness proceeds to demonstrate) Tell the jury what the machine is and what it is designed to do, and what it will do.

A. This machine here is not my invention, this machine is a stock adding machine made by the Wales Company in Wilkesbarre, known as the Adding Machine Company. This coin paying device is my invention and is connected to this adding machine, so that when the key is depressed here and this handle of the adding machine operated the is ejected here into the hand or envelope; it is listed on the paper of the adding machine here, and is added on the wheels of the adding machine here. The connect and disconnect is at this point. There is a large operating lever. (Operating machine) This is simply a connecting link from the coin paying mechanism to the adding machine. By taking out that thumb screw you disconnect all of the pay mechanism so that you can list and add without paying money, or without ejecting money, but when that link is attached by that thumb screw, then the operation of the adding machine also operates the paying machine over here, so that when you put down a key here and pull your handle, that amount will be

ejected over here to the hand or envelope, recorded on the paper here and added on the wheels here. Whenever you wish to add and list without paying, as I have said before, take this thumb screw out and you at once have separated your adding and paying mechanism, or the machine can be lifted bodily from this and the adding machine taken off to other parts of the office and used independently of this.

Q. In other words, the machine is so constructed that you can use the adding machine with or without the coin paying mechanism?

A. Yes, sir.

Q. And they are detachable?

A. Detachable, yes.

Q. And so arranged that by the manipulation of this screw or device on the end of the machine the adding machine either will or will not work in conjunction with the coin paying mechanism?

A. That is right.

Q. In other words, to make it plain, if you are using the adding machine as such, by handling it in the manner you have described, you could mark the number of figures by depressing the proper keys indicating the proper amounts, and that would add into the adding machine, without working the coin paying mechanism at all.

A. Yes, sir.

Q. And then by replacing that screw, the adding machine would perform exactly the same work, and in addition to that the proper amount of change would be paid out of the coin paying mechanism?

A. That is right.

Q. Now, what is the feature of novelty about that arrangement and about that machine—what is the main feature of novelty?

A. The ability to separate the adding mechanism from the paying mechanism is one of the principal objects.

Q. Now, to what sort of adding machines can this coin paying mechanism be attached?

A. This coin paying mechanism has been attached to the Wales machine, to the Burroughs machine, and can be adapted to and attached to any regular type of adding machine.

Q. Do I understand you then that in the marketing of the machine you could simply sell the frame of the coin paying mechanism and they would connect it on to the regular adding machine, without the necessity of purchasing an adding machine?

A. This one here could be. This one would have to be taken into the shop and the key stems extended: that one there is a stock machine connected with the other machine.

Q. The machine you have been demonstrating now is the first model?

A. That is the first model.

Q. Have you the latest model of the payograph machine?

A. This is the latest model.

Q. Now, demonstrate to the jury the latest model.

A. This here is what is termed the Burroughs Visible Adding Machine; this here is the payograph with the extension or mezzanine keyboard, so that when you depress a key here you set the mechanism not only for the paying but also for the adding machine beneath, and pressing the corresponding key of the adding machine; then when you operate the handle here you not only list and add on the adding machine, but you pay that amount over here; this can operate independent on this, that is the adding machine independent of the coin paying, simply by changing this button on this side. With it in position it would pay, list and add; with the button turned that way, it would add, list, but would not pay. Then this machine, the adding machine, can be taken out bodily from beneath and used as an ordinary adding machine about the office the days they don't wish to pay off.

Q. Now, what is the feature of novelty in that machine, Mr. Oviatt?

A. The principal feature is the same as in that, ability to separate your adding mechanism from your paying mechanism.

Q. You claim to be the inventor of any part or portion of the adding machine?

A. No.

Q. What adding machine do you use in connecting your machine to it?

A. We are using right here the Burroughs.

Q. What is the reason, the main reason, for simply connecting your machine to it, instead of making an adding machine of your own?

A. Well, there are many reasons. One reason is that we don't care to go into an experimental field and take our chance to patent suits with the adding machine companies. We also wish to avoid the expense incidental to the manufacture of adding machines. We get the support of the adding machine company and salesmen rather than their non-support. Furthermore, any company as a rule which has employees enough to warrant the using of a paying machine of this type already owns an adding machine. They pay off once a week as a rule, and by attaching to the adding machine which they already own they are saved the expense incidental to buying a complete adding mechanism, which we might otherwise have to devise and build into the machine.

Q. In other words, a company to whom you might want to sell already owning an adding machine would not have to buy the complete outfit?

A. No.

Q. Now to what machines, Mr. Oviatt, can you—to what sorts of adding machines and kind of adding machines can the payograph be attached, and from which it can be detached?

A. We can attach to the Wales, Burroughs, White, made in New Haven, Connecticut, to the Universal; that is owned by the Burroughs. That

is practically all of the machines in the market having the ordinary type of keyboard.

Q. What is the fact as to whether or not the adding machines you have mentioned are the principal adding machines that there are being manufactured and sold in the United States?

A. There are only two principal adding machines, that is the Burroughs and the Wales, at the present time. The White in New Haven hasn't attained very much publicity.

Q. Now is it—this machine that you have demonstrated before the jury, this last machine, Mr. Oviatt that is in interference with the machine of the United States Cashier Company, known as the Bank Cashier?

Mr. Pipes: Now, may it please the court, that still raises the question.

Mr. Reames: I won't insist upon it until I present my point."

To the overruling of said objection the defendant Gernert was duly and regularly allowed an exception.

III.

That the Court erred in admitting in evidence over the objection of the defendant Gernert, as proof of the overt acts alleged in the indictment each and every of the letters set out in the indictment as overt acts numbers one to sixteen, inclusive:

Mr. Reames: I am now about to offer in evidence Government's Identification 115, which

forms the basis of overt act No. 1, a letter written by Mr. Bonnewell. I have a stipulation with Mr. McHenry to the effect that the letter was written by Mr. Bonnewell and mailed, and I want him here before I introduce it.

Mr. Maguire: Before the Government offers in evidence any evidence of overt acts, I would like at this time that the Court require the United States Attorney to declare whether he elects to prosecute these defendants for a violation of Section 37 of the Penal Code, or for a violation of Section 215 of the Penal Code. The indictment is drawn in such a general manner that there will be difficulty in determining whether it is a violation of Section 37, or a violation of Section 215, and in order that the defendants may preserve the record, it seems to me at this time we are entitled to know from the District Attorney upon which section he elects to proceed.

Mr. Reames: As stated in my opening statement to the jury and as stated in the indictment itself, this is an indictment for a violation of Section 37 of the Penal Code.

Mr. Maguire: Does the United States Attorney contend that the various overt acts set out in the indictment were the overt acts referring to, and in pursuance of the particular conspiracy set out in that indictment?

Mr. Reames: Yes.

Mr. Maguire: Refer to no other.

Mr. Reames: Yes, the ones attempted to be proven at this time.

Mr. Maguire There have been offered and received numerous exhibits from Exhibit 120 to Exhibit 272, consisting of letters purporting to have been signed and mailed by the United States Cashier Company and by Mr. LeMonn as its sales agent, and Mr. Menefee as its president. Do I understand that it is the contention of the Government that these letters were written and mailed in the United States mail?

Mr. Reames: Yes.

Mr. Maguire: That is a matter of record now, so we may proceed and rely upon it?

Mr. Reames: Yes. The evidence of the Government has offered as to the manner in which these exhibits came into our possession, and the Government now claims it is proved by circumstantial evidence that these letters and various exhibits referred to by counsel were written and mailed in the United States mail in the ordinary course of business.

Mr. Maguire: And were mailed and relate to and refer to the particular conspiracy set out in the indictment?

Mr. Reames: Yes.

Mr. Maguire: And were in execution of that particular conspiracy?

Mr. Reames: I think so. The next is Government's Identification 212. That is the one identified by the witness Klein as having been received by him in New York City.

Mr. Pipes: No objection to the identification on our part.

Mr. Reames: Then may we have the admission that on July 23, 1912, Mr. Frank Menefee, either deposited or caused to be deposited this letter of date July 23, 1912, in the United States mails at Portland, Oregon, and at that time it was enclosed in an envelope, and had its postage fully prepaid?

Mr. Pipes: Yes.

Mr. Reames: The Government then offers in evidence letter of date July 23, 1912, Government's Identification 212, identified by the witness E. Klein when he was on the stand, as having been received by him at New York City, a few days after July 23, 1912, and the Government offers it as forming the basis of Overt act No. 2.

Mr. Maguire: On the part of the defendant Gernert objection is offered to this testimony on the ground that it is not an overt act for the purpose of executing the conspiracy set out in the indictment, for the reason that assuming the Government's contention to be true, and the allegations of the indictment to be true, the conspiracy, if any has been fully executed and terminated and performed, at least as early as June, 1911.

Now, may it please the Court, the defendants in this case are charged not with having devised a scheme to defraud, not with violation of Section 215 of the Penal Code, but with having conspired to commit an offense against the United States. The District Attorney has conceded that all the letters

which have been offered in evidence, and which he claims, and which of course for the purpose of this argument is admitted, went through the mails, were written and mailed for the purpose of executing the scheme to defraud, which he has set out and alleges to be true, in his indictment. Now, the gist of that offense is not in promoting of the scheme, but it is in the use of the mails to carry out an alleged scheme to defraud. The defendants are charged in this indictment with having conspired and confederated together to commit that particular offense; that is the offense of placing a letter in the mails for the purpose of executing the particular scheme to defraud set out in this indictment. Now, when that offense, that is, when the objects of the conspiracy have been consummated, there can be no further acts committed by any one, to be charged in the indictment or to be offered or admitted in the evidence, for the crime, if any, has been committed.

COURT: This indictment charges a continuing conspiracy.

Mr. Maguire: Quite so, Your Honor. And under the continuing conspiracy the statute of limitations does not commence to run from the first overt act, but from the last overt act, but it must be an overt act for the purpose of committing the particular offense set out in the indictment. Now, the particular offense set out in the indictment is the use of the mails for the purpose of defrauding, the mailing of a letter, rather, to carry out a scheme set

out in the indictment, and the District Attorney says that the scheme had been formed in September, and that these particular letters set out in 1911 and offered in 1911, were for the purpose of executing the scheme. Now, the conspiracy must have existed in the minds of the defendants prior to the devising of the scheme and when that offense was completed or committed, if any at all—of course, I merely assume that for the purpose of this argument, because it is in effect a demurrer to this evidence, and to the indictment—when that was completed, then there was nothing further to do. Now, let's take this state of facts, that counsel has put in here. He said that these defendants got together in September, 1910, for the purpose of devising and executing a scheme to defraud. Now, that offense was committed, and that conspiracy was consummated, at the time the first letter was placed in the mails for the purpose of executing the scheme. Now, any further acts, any further mailing of letters, were separate and distinct offenses. Any agreement or conspiracy was a separate and distinct conspiracy. Any agreement or conspiracy was a separate and distinct conspiracy, and cannot be joined in the same count of the indictment, and it is a question whether they are permissible to be charged in the same indictment, and unquestionably that cannot be done in the same count of the indictment. Therefore, under the District Attorney's own admission these particular letters did not refer to completing and committing an offense, if any offense at all was committed.

Argument of Counsel.

COURT: I understand your position, and I don't think it is necessary to take up any more time on it. I have ruled on that question a good many times, and as long as the indictment charges a continuing offense, as it does in this case, I think it is competent for the Government to give in evidence any act that may be selected by it as an overt act, providing it has charged a continuing conspiracy, and I don't think the first overt act terminates the conspiracy so the objection will be overruled.

MR. MAGUIRE: Save an exception.

MR. PIPES: That applies also to all the other defendants.

COURT: The same objection goes to all the defendants, and an exception.

Whereupon, the United States of America offered in evidence each and every letter set forth in the indictment as overt acts being therein numbered as overt acts I to XVI, to the admission of each of which for the reason hereinbefore set forth the defendant Gernert duly made objection, which objection was overruled by the Court. To the action of the Court in overruling said objection and in admitting said letters in evidence as proof of the overt acts set out in the indictment, the defendant Gernert was allowed an exception.

IV.

That the Court erred in refusing to grant defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert, for the reason that the indictment does not state facts sufficient to constitute crime.

V.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to Defendant Gernert, for the reason that the indictment charges more than one crime.

VI.

That the Court erred in denying and overruling the defendant Gernert's motion to the Court to direct jury to return a verdict of not guilty as to the defendant Gernert for the reason that there is no evidence tending to show formation of any conspiracy described in the indictment.

VII.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that the evidence does not show any confederation, agreement or conspiracy on the part of the defendant Gernert with the defendants named in the indictment.

VIII.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to defendant Gernert for the reason that the evidence showed that the conspiracy, if any, was terminated and completed more than three years prior to the finding of the indictment.

IX.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that upon the face of the record it appears that none of the overt acts which appear in the indictment were committed prior to the termination of the conspiracy and effectuating its said object.

X.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that it appeared from the face of the record that the defendant Gernert was not associated with the conspirators named in the indictment nor employed by the United States Cashier Company within three years of the finding of the indictment.

XI.

That the court erred in denying and refusing to give the following instruction #3 requested by the defendant O. E. Gernert:

“Again, even though you should find from the evidence that fraud or injury resulted from the acts of one or more of the defendants and was brought about or executed in whole or in part by use of the mails, yet, if you would not find that there was an agreement or understanding between the defendants and all of them to devise such a scheme and to execute it in the manner hereinbefore alleged, then you must find the defendants not guilty.”

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XII.

That the Court erred in denying and refusing to give the following instruction #4 requested by the defendant O. E. Gernert:

“Gentlemen of the Jury: You are further instructed that it is not sufficient for the government in this case to show that certain of the defendants combined to perform certain acts and some one or more combined with others to perform different acts, even though the defendants had a similar purpose in view, but the evidence in this case must show beyond a reasonable doubt that each and all of the defendants agreed and conspired together to do these things.”

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XIII.

That the Court erred in denying and refusing to give the following instruction #6 requested by the defendant Gernert:

“The existence of a conspiracy cannot be established as to one of the defendants by the acts or declarations of another defendant committed in his absence and without his knowledge or concurrence, nor can the connection of a particular defendant to a conspiracy be established or proved by what is said or done by another person alleged to be a co-spirator. Therefore, in determining whether or not there was a conspiracy and whether or not any particular person was a party to such conspiracy you are limited to the things done by him, and unless you find beyond a reasonable doubt from his debts that he had an intent to defraud and that he had knowledge that the Company did not have, own or control the patents which it claimed to have and that he knew the Company did not intend to manufacture such machines (if you find from the evidence it was not their intention so to do) and that he knew that the Company did not have bona fide orders for its machines and that he knew that the Company would not make large profits and that he knew that the financial condition of the Company was not excellent but was insolvent and that the liabilities of the corporation greatly exceeded its assets and that he knew that the stock by reason of these things was worthless.

In other words the government has alleged in the indictment that the stock in this corporation was worthless by reason of certain alleged facts and conditions which it sets out in detail, and before you can find any particular defendant guilty under this indictment it will be necessary for you to find beyond a reasonable doubt that such defendant knew that the stock of the Company was worthless because of the particular matters which the government charges.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XIV.

That the Court erred in denying and refusing to give the following instruction #7 requested by the defendant O. E. Gernert:

“The mere fact that any one of the defendants may have made statements which were false or misleading in order to induce others to purchase stock in this corporation, would not of itself justify you in finding him guilty of the crime of conspiracy as charged in this indictment unless you further find that the defendant made such statements knowing that the stock he was offering for sale was worthless.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XV.

That the Court erred in denying and refusing to give the following instruction #8 requested by the defendant:

The mere assertion by a salesman that certain stock offered for sale was Company stock instead of personal stock would not justify you in finding such salesman guilty of the crime charged in this indictment. There is no difference between Company stock and personal stock, it is all stock in the United States Cashier Company, and if such salesman at the time of making such representations did not know or have knowledge of the matters which the government alleges rendered said stock worthless, but believed said stock to be valuable, then no presumption of fraudulent intent would arise and said defendant would not be guilty of the crime charged and you should find such defendant not guilty.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XVI.

That the Court erred in denying and refusing to give the following instruction #10 requested by the defendant Gernert:

You are further instructed that so far as the stock salesmen were concerned they were and are not officers of the Company and they stood in no

fiducial relation toward its stockholders or toward such persons as it might be their duty in the course of their employment to endeavor to induce to purchase stock of the Company, and such salesmen had the right to freely contract with the Company and had the right to obtain the best contract they could for themselves without being guilty of fraud or wrong doing, and the mere fact, if you shall find it to be a fact, that they received a large commission, is not of itself any evidence of fraud or wrong doing on their part. They had a right to place whatever value they might desire upon their services and to obtain and make the best bargain they could with their prospective employers. The business of selling stock in a corporation or obtaining subscriptions to the same is a legitimate business and there is no presumption or suspicion of any kind against a man who engages in such business.

Exaggeration or puffing of the value of an article or enterprise does not constitute a crime and is not criminal or fraudulent unless the person making such statements intends thereby to defraud the purchaser.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XVII.

That the Court erred in denying and refusing to give the following instruction X-A requested by the defendant Gernert:

There is no presumption from the fact that a statement is false that it was made with a fraudulent intent.

Southern Devp. Co. v. Silva, 125 U. S. 248.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XVIII.

The Court erred in denying and refusing to give the following instruction #XI requested by the defendant Gernert:

It is incumbent upon the government to show that the representations or statements made by any one of the defendants were not only untrue but that the defendant knew them to be untrue, and in addition to those two elements intended thereby to injure and defraud.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XIX.

The Court erred in denying and refusing to give the following instruction #XII requested by the defendant Gernert:

There is no presumption of fraud from the fact that a glittering and glowing promise may have been made and not carried out, unless it shall ap-

pear that the person who made such promise knew at the time of making the same that it could not be carried out and would not be carried out.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XX.

That the Court erred in charging the jury as follows:

The indictment charges that the alleged fraudulent scheme was to be carried out and executed by certain specific false representations. It is not incumbent upon the government to prove that all of the means set out in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that any of them were actually used or put into operation. It is sufficient if it be shown to your satisfaction, beyond a reasonable doubt, that the conspiracy was entered into for the purposes indicated, and that one or more of the means described in the indictment were to be used to execute it, and that, during the continuance of the conspiracy, the alleged overt acts, or some one or more of them, stated in the indictment were done by one or more of the conspirators to effect the object thereof.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXI.

That the Court erred in charging the jury as follows:

In order for one person to defraud another, it is not necessary that he should bear any malice or ill-will toward such person. If the defendants in this case agree together that they were to sell the shares of stock in this corporation upon and on account of false and fraudulent representations, which they would make knowing these representations would be false and untrue, and knowing that they would be made for the purpose of deceiving the investors and the public as to the true condition and value of the shares of stock, then the law would imply that they intended to defraud all of the persons who should buy shares of stock from them, or from the Cashier Company, relying upon such representations.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXII.

The Court erred in charging the jury as follows:

It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company? Was it their belief that

they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises, if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they would finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXIII.

That the court erred in charging the jury as follows:

In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors

and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business of the corporation a success, or how confident they may have been that they would be able to return that money without loss, or without profit, because the representation which they would have agreed to make would be for the purpose of getting the money in a wrongful way and they could not, under such circumstances make them rightful by pointing to some ultimate good intent.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception is allowed by the court.

XXIV.

That the Court erred in charging the jury as follows:

The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful and his intent to pay it back without loss cannot cancel the wrong. So in this case if the defendant by means of the false and fraudulent representations set out in the indictment agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ulti-

mately return that money without loss and with profit would not condone the wrong in getting the money by deception.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXV.

That the Court erred in charging the jury as follows:

The law presumes that every man intends the logical and natural consequences of his own wrongful acts. Applying this rule to the case at bar, if you believe from the evidence, and beyond a reasonable doubt, that these defendants agreed among themselves that they would sell to the public and to these investors the shares of stock of the United States Cashier Company, under the false and fraudulent representations set out in the indictment, or some of them, then you would be justified in finding that the defendants agreed to defraud the investors and the public, notwithstanding the fact that you also might believe that the defendant really believed that the value of the stock would be ultimately such as to return to the investors a profit instead of a loss.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the court.

XXVI.

That the court erred in charging the jury as follows:

It is not necessary in this case in order to convict one or more of the defendants that you should be satisfied that each of the defendants knew or understood all of the fraudulent representations, promises or pretenses that were to be made, if any were to be made, if one of the defendants at any time prior to the period of three years from the date of filing the indictment and prior to the time when any overt act set out in the indictment was committed agreed with another of said defendants that they would act jointly in carrying out the alleged fraudulent scheme set out in the indictment, and in selling the stock of the corporation representing that the money to be received from such sale was to go into the treasury of the company to be used by it in building factories, knowing that the shares of stock, which were to be offered for sale, were in truth and in fact the privately owned stock of another of the defendants and that none of the money would go into the treasury of the company, and you further believe from the evidence that some of the false and fraudulent pretences and promises set out in the indictment were to be used by the defendant for the purpose of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell their stock in such manner and under such false representations, were parties to the conspiracy.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXVII.

That the Court erred in charging the jury as follows:

If you believe from the evidence that the original purpose of the defendants was legitimate, and you further believe from the evidence that they believed in the future of the United States Cashier Company and believed that it would ultimately pay dividends to the investors, and you believe from the evidence and beyond a reasonable doubt that they deliberately agreed together to take advantage of the public interests between a meritorious invention in order to sell to the public shares of stock by the false and fraudulent representations set out in the indictment, if they were false, then you would be justified in finding that the defendants intended to defraud the persons to whom they should sell such stock.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the Court.

XXVIII.

That the court erred in charging the jury as follows:

In determining whether or not the defendants intended to defraud the investors of the money by

selling to them the shares of stock of the corporation, you have a right to take into consideration the question of the commissions which the evidence shows, or tends to show were received by the defendant or any of them, from the proceeds of the sale of this stock.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the Court.

XXIX.

That the court erred in charging the jury as follows:

Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among other things, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of direct or circumstantial evidence, the aid of which is constantly required not merely for the purpose of remedying the want of direct evidence, but also to supply protection against im-

position. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, great latitude is allowed in its admission, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered may, by their number and joint operation establish or corroborated by minor circumstances be sufficient to constitute conclusive proof. And where fraud in the purchase or sale of property is in issue evidence of fraud of like character committed by the same parties at or near the same time, is admissible, on the ground that where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceed from the same motive.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXX.

That the court erred in charging the jury as follows:

The indictment charges that the conspiracy was formed in September, 1910. The date is not material. It is sufficient if it was formed sometime prior to the overt acts charged in the indictment and continued and in existence at the time of such acts.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception was allowed by the Court.

WHEREAS, by the law of the land, said judgment ought to be given for said defendant O. E. Gernert, plaintiff in error herein, and against the plaintiff United States of America, defendant in error herein, said defendant O. E. Gernert does now pray that the judgment herein rendered against him be reversed and annulled and altogether held for nothing, and the sentence herein imposed upon him be set aside and held for naught, and that he be restored to all things which he has lost by occasion of the said judgment; that the said District Court be directed to sustain defendant's demurrer to said indictment, or to grant a new trial of said cause; and that defendant be afforded such and any and all other relief as may be meet in the premises.

Dated this 29th day of March, A. D. 1916.

ROBERT F. MAGUIRE,

of Attorneys for said Defendant O. E. Gernert.

State of Oregon,

County of Multnomah,—ss.

Due service of the within Petition for Writ of Error and Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 29th day of March, 1916, by receiving a copy thereof, duly certified to as such, by Robert F. Maguire, one of attorneys for O. E. Gernert.

Clarence L. Reames,
United States Attorney.

Filed March 29, 1916.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Wednesday, the 29th day of March, 1916, the same being the 21st judicial day of the regular March, 1916 term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OF ERROR.

O. E. Gernert, the defendant in the above entitled cause, having filed herein and presented to the Court his petition praying for the allowance of a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the above-entitled court, and having submitted therewith the Assignment of Errors intended to be urged by him; praying also that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to said United States Circuit Court of Appeals for the Ninth Circuit, and praying also that meanwhile all further proceedings in the above-entitled District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals;

IT IS HEREBY ORDERED that the aforesaid Writ of Error be, and the same is, hereby allowed; and

IT IS FURTHER ORDERED that a transcript of the record, proceedings, and papers in this cause, duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that all further proceedings in this above-entitled District Court be suspended, stayed, and superseded until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit upon filing an undertaking in the sum of \$2500 to be approved by clerk.

IT IS FURTHER ORDERED that upon filing of said bond, sentence and execution herein be stayed until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 29, 1916.

R. S. Bean,
United States District Judge.

Filed March 29, 1916.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 4th day of April, 1916, there was duly filed in said Court, a Bond for Costs on Writ of Error in words and figures as follows, to-wit:

BOND FOR COSTS ON WRIT OF ERROR TO
THE DISTRICT COURT OF THE
UNITED STATES FOR THE
DISTRICT OF OREGON.

KNOW ALL MEN BY THESE PRESENTS, That we, O. E. Gernert, as principal, and the Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto the United States of America in the full and just sum of One Hundred Dollars, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of April, in the year of our Lord, one thousand nine hundred and sixteen.

WHEREAS, lately at a District Court of the United States for the District of Oregon, in a suit depending in said Court, between the United States of America, plaintiff, and O. E. Gernert, defendant, a judgment and sentence were rendered against the said O. E. Gernert, and the said O. E. Gernert having obtained from said Court a writ or error to reverse the said judgment and sentence against him in the afore-said cause, and a citation directed to the said United

States of America, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty (30) days from and after the day of said citation, which citation has been duly served:

NOW the condition of the above obligation is such that if the said O. E. Gernert shall prosecute said Writ of Error of effect, and answer all costs involved therein, then the above obligation to be void; else to remain in full force and virtue.

O. E. Gernert, (Seal)

By Robert F. Maguire, his Attorney.

(Seal)

Massachusetts Bonding and Insurance Company,

By its Attorney in Fact, Frank E. Smith.

Signed, sealed, taken, and acknowledged before me this 3rd day of April, 1916.

My commission expires April 17th, 1917.

Louis R. Centro,

(Seal)

Notary Public for Oregon.

United States Commissioner,

District of Oregon.

Form of bond and sufficiency of surety approved this 4th day of April, 1916.

Charles E. Wolverton,

United States District Judge.

Filed April 4, 1916.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 13th day of April, 1916, there was duly filed in said Court and cause a Praecipe for Transcript in words and figures as follows, to-wit:

PRAECIPE FOR TRANSCRIPT.

G. H. Marsh,
Clerk of said Court,
City.

Dear Sir:

You will please prepare a transcript on appeal in the above entitled cause for the defendant O. E. Gernert, and make a part of said transcript as follows:

1. Indictment.
2. Bill of Exceptions.

Also the Journal entries as follows:

1. Plea of not guilty.
2. Return of verdict and verdict.
3. Sentence.
4. Citation on Writ of Error.
5. Writ of Error.
6. Order allowing Writ of Error.
7. Petition for Writ of Error.
8. Assignment of Errors.
9. Bonds for costs.

Praecipe for Transcript.

Yours truly,

Robert F. Maguire,

Attorney for Defendant O. E. Gernert.

Filed April 13, 1916.

G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,)
) ss.
 District of Oregon,)

I, G. H. MARSH, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on writ of error in the case in which the United States of America is plaintiff and defendant in error, and O. E. Gernert is defendant and plaintiff in error, in accordance with the law and the rules of court and in accordance with the praecipe of said plaintiff in error, and that the said transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$. for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this day of April, 1916.

Clerk.

No. 2785

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

O. E. GERNERT,

Plaintiff in Error.

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF APPELLANT

Writ of Error to the District Court of the United
States for the District of Oregon

CLARENCE L. REAMES,

U. S. Attorney for the District of Oregon.

LITTLEFIELD & MAGUIRE,

Attorneys for O. E. Gernert, Appellant.

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BRIEF OF APPELLANT.

Writ of Error to the District Court of the United States for the District of Oregon.

The appellant, O. E. Gernert, appeals from a judgment of the District Court of Oregon sentencing him to four months' imprisonment in the county jail of Multnomah County, for a violation of Section 37 of the Penal Code, in conspiring with Frank Menefee, F. M. LeMonn, B. F. Bonnewell, H. M. Todd, Oscar A. Campbell, Thomas Bilyeu and others to devise a scheme and artifice to defraud by the use of the mails.

STATEMENT OF THE CASE.

After a trial which lasted from the 8th of July to the 20th day of August, 1915, of which time not more than half a day was occupied by giving of testimony against him, the appellant was convicted. He brings this appeal because he is firmly convinced that throughout the case he was compelled to bear the burden of the misdeeds of others, of the misrepresentations of others, of the fraud that was practiced by the managing officers of the United States Cashier Company, for which he was but a mere employee, of misrepresentations and misdeeds of which he had neither knowledge or notice, of facts of which he was in total ignorance.

Because of that firm belief he has declined to join with the other defendants in their appeal. Their acts were not his acts, their representations were not his representations, their guilty knowledge was not his knowledge, their fortunes should not be his, and he earnestly prays this court that in judging whether he has had a fair and impartial trial, and whether error was committed as to him, that he be judged by his acts alone.

He comes before Your Honors not invoking technicalities in order that a guilty man may escape, but that before this tribunal, removed from the atmosphere of passion and prejudice which swayed and governed the trial in the court below, he may have and obtain justice.

It is the fact as the record discloses, and as the Government will not deny, that the lack of patents, that the facts as to the financial statements, that the facts relative to the value of the patents, that the facts relative to Oviatt's machine, that the facts relative to putting the Cashier Company's machines on the market, that each and every fact which the Government contends rendered the stock of the U. S. Cashier Company valueless, and its purchase a delusion and a snare, were as unknown to the appellant, O. E. Gernert, as they were to the public which read the advertisements and which invested in this costly toy.

Gernert was not an executive officer of the company, he was not a member of the Board of Directors, he had nothing to do with the books, or with the factory, or with the patents, he was solely a stock salesman, and all the knowledge he had came to him from the executive officers, and from the literature which the Company issued.

THE INDICTMENT.

The indictment charges that the defendants conspired to devise a scheme and artifice to defraud to be effected by means of the postoffice establishment of the United States and to obtain money and property by means of false and fraudulent representations and promises.

It alleges that this fraud was to be accomplished in the following manner: A corporation was to be formed, and its stock sold to investors who should be induced to purchase the stock in the following manner:

1. By inserting advertising matter in newspapers, pamphlets, catalogues, circulars, letters and by oral representations that;

2. The United States Cashier Company owned patents to the following described machines:

- a. Change Computing Machine.
- b. Bank Cashier.
- c. Lightning Change Maker.
- d. Currency Paying Machine.
- e. New Style Adding Machine.

3. That the company was engaged in the business of manufacturing and selling said machines.

4. That on account of the patents and the alleged manufacture and sale of the machines the shares of stock of the corporation were of great commercial value and large dividends would be paid thereon.

5. That the United States Cashier Company would declare and pay large and certain dividends within six months from the date of the purchase of said stock from any of the defendants or the corporation.

6. That the company was the owner and in the possession of large bona fide orders for the purchase of said machines.

7. That by reason of said orders the company would make a large profit.

8. That the financial condition of the company was excellent.

9. That the assets of the corporation far exceeded in value the total amount of liabilities.

10. That a large amount of the stock of the corporation, which should be offered for sale to the investors belonged to and was the property of the corporation and that the money derived from the sale would be by the corporation invested and used in such a manner as to increase the assets of the corporation, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines.

11. That the assets of the corporation were so much greater than its liabilities that the defendants were justified in raising and increasing the sale price of said shares of stock from par value (which was \$10.00) up to \$30.00 and \$50.00.

The indictment thereupon proceeds to negative all of those representations and alleges that they were false

and that the stock was in truth and in fact worthless, and that the defendants knew that the representations were false and that the stock was of little or no value.

The indictment is based upon the theory that the stock was worthless and by reason of that fact the investors and the general public were defrauded. Such was the fact, and there is little doubt that they were so defrauded. But it is self-evident that if the stock had been of the value that the United States Cashier Company claimed it was, and had paid the dividends that the president and sales manager claimed would be paid, the investors would not have been defrauded and no case under the Federal laws would have resulted.

THE GOVERNMENT ALLEGES A CONSPIRACY TO DO THE THINGS SET OUT IN THE INDICTMENT. It is therefore incumbent upon it to establish that the defendants and each of them conspired and had in mind the particular scheme to defraud alleged in the indictment and that it should be carried out in the manner set forth therein.

Before the United States was entitled to submit the liberty and reputation of the defendant O. E. Gernert to the jury, it must first prove that he was possessed of knowledge of the facts which the Government avers rendered the stock worthless and that he knew that the representations relative to those facts were false.

No man could possibly be held to have conspired to devise a scheme to defraud unless he knew the facts which rendered the scheme fraudulent and which made the stock worthless. *This the Government failed to do.*

There is *no testimony* in the record even *tending* to show that O. E. Gernert had knowledge or notice, or even suspected any of the following conditions:

a. That the company did not have the patents to the machines which it was building and advertising, *but on the contrary the managing officers of the company assured him in writing that such was the case.*

b. That the company was not engaged or intending to engage in the *bona fide* business of manufacturing and selling those machines, *but he was continually informed by the managing officers that the manufacture and sale of the machines was but a matter of a few weeks.*

c. Or that the patents which the company in fact owned were infringements on prior patents or were otherwise worthless, *but on the contrary he was sent and shown letters from patent attorneys to the effect that the patents were good.*

d. Or that the Gernert made any representations that the company would pay dividends which other defendants said they would, or that he suspected that the company would not pay such dividends, *but on the contrary he was given literature setting forth the dividends paid by similar companies and was assured that the U. S. Cashier Company would do likewise.*

e. Or that the defendant Gernert represented to anyone that the company would commence paying dividends within six months from any purchase of its stock.

f. Or that he knew that the company was not in possession of large *bona fide* orders for its machines,

but on the contrary he was informed by Menefee and LeMonn that such was the case.

g. Or that he knew that the company would not make large profits, *but was continually informed by his superior officers that it would.*

h. Or that Gernert knew that the financial condition of the company was bad or that its liabilities greatly exceeded its assets, *but he was repeatedly given the same information that was given the other stockholders.*

i. Or that he knew or suspected that the assets did not exceed in value the total amount of liabilities, *but he was continually informed that they did.*

j. Or that he knew that the financial condition of the company did not justify the raises in the price of its capital stock, but on that subject as on the others the same representations were made to Gernert that were made to the other investors in the company.

In other words the United States totally failed to show that the defendant Gernert had any knowledge of the very matters which it claims rendered the stock worthless and which he must have known if he conspired to defraud the public by such means.

The United States did, however, show that Gernert made one trip, and only one trip, during which he sold some of his personal stock to several people in the Yakima Valley, upon representations that the stock was company stock when it was in fact his own. That is the sum, substance and limit of the Government's proof.

ASSIGNMENT OF ERRORS.

O. E. Gernert, defendant in the above-entitled action, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a Writ of Error from this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and entered in said cause, against said plaintiff in error, and petitioner herein, now makes and files with his said petition the following assignment of errors herein upon which he will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the District of Oregon there are manifest errors in this, to-wit:

I.

That the Court erred in admitting in evidence against the defendant, O. E. Gernert, Government's Exhibit 293, being a carbon copy of a letter dated Portland, Oregon, February 10, 1912, addressed to O. E. Gernert at Portland, Oregon, as follows:

“Portland, Oregon, February 10th, 1912.

Mr. O. E. Gernert,

Portland, Oregon.

Dear Sir:—

In reference to our understanding in regard to your selling stock in California territory, will say that we will make you the following proposition: You are to work in the territory from San Francisco south toward Los Angeles, keeping at a distance from said latter place, so as not to interfere with the territory or work of our Agent there, and you are to have working under you such men as you may mutually arrange for, and after the first advancement to any of the men working under you, no further advancement shall be made to any of them, except through you.

All men working under you shall receive a commission of fifteen (15%) per cent, providing the business done by them shall not equal or exceed the sum of One Thousand Five Hundred (\$1,500.00) Dollars per month; twenty (20%) per cent if the business done by them shall exceed One Thousand Five Hundred (\$1,500.00) per month and shall not exceed Three Thousand (\$3,000.00) Dollars; and twenty-five (25%) per cent if the business done by them in any one month shall exceed the sum of Three Thousand (\$3,000.00) Dollars; these commissions to be allowed and rated only on cash business done by each of your men respectively.

On all the business done by your men where settlement is made in paper, and either notes or con-

tracts taken only a fifteen (15%) per cent commission shall be allowed, and no paper shall be taken to run longer than ninety (90) days provided where settlement is made for purchases of stock by note, if you or your agent shall succeed in discounting said note without recourse, so that the proceeds shall be received by us within ten (10) days after the close of the month in which the sale of the stock is made for which said note is taken in settlement, same shall be credited back as cash business for the month in which the subscription was taken. The commissions on settlements made by note or contract or in any manner other than cash, shall only become due and payable when the money is received by us for the sale or collection of said note or contract.

The above terms shall apply to any business done by you personally without the aid or assistance of an agent.

It is understood and agreed that you shall be entitled to receive an over-head commission on all business done by you or your agents of five (5%) per cent, and your commission shall be due and payable as that of the Agents, or in other words, on cash received, or on notes negotiated without recourse or collected.

We will advance to you for your personal expenses the sum of Twenty-five (\$25.00) Dollars per week, and pay you in addition to the above commission, a salary of Fifty (\$50.00) Dollars per week, it being understood that the Twenty-five (\$25.00)

Dollars per week expense money shall be returned to us or deducted from your commissions as earned.

No settlement shall be made by you or any of your Agents on cash business turned in to you or through you to us, except the minimum commission of fifteen (15%) per cent on cash received, which you may retain and pay to the agents as the cash is received by you, and the bonuses or extra commissions, if any shall accrue to any agent, shall only be settled ten (10) days after the close of the month, when the volume of business done by each person working under you, shall be finally ascertained.

It is understood that in all sales made by you or your organization, you shall have the right to turn your own personal stock for one-fourth ($\frac{1}{4}$) of all such sales; that the turning over by you of the stock to the amount of one-fourth ($\frac{1}{4}$) of all of the net proceeds, less your commissions, agents' commissions, and other expenses incurred in the selling of the stock which you shall dispose of.

In consideration of allowing you to dispose of one-fourth ($\frac{1}{4}$) of the stock handled by you, from your personal stock, you are to bear one-fourth ($\frac{1}{4}$) of the expense of your own salary, sales commissions, and other expenses, it being understood that our agreement to pay to you the salary mentioned, and advance to you the money as above stated, is to be considered only as a loan to the extent of the advancement of the Twenty-five (\$25.00) Dollars per week, and one-fourth ($\frac{1}{4}$) of your salary.

With reference to all notes taken by you, it is understood that you shall, where you leave same with a local bank for collection, take a receipt from said bank, particularly describing the note, the returns and commissions to be allowed for the collection and so deposit the same that the proceeds will be at once accounted for and remitted to the undersigned by said bank.

Yours faithfully,

No. 3.

F.M.:MM

over the objection of the defendant Gernert.

II.

The Court erred in overruling an objection of the defendant Gernert to the following testimony of the witness Oviatt on his direct examination:

“That he had devised the principles of a coin paying and (in the summer of 1909) had gone to Mr. Glover, a public engineer with a view to having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results, and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas, and Bilyeu was to proceed with the development and put it into work-

ing shape, and build a model. That the witness had disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod, so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position. That Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided sixty per cent to the witness and forty per cent to Bilyeu, and that was agreeable to witness, and that they shook hands on it. That Mr. Bilyeu said to him, 'I will take you out to my model maker,' which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin and said that the witness had been associated with Mr. Potter in the development of the machine, and had not been treated properly by Mr. Potter; that witness had devised a machine of his own and arranged with Bilyeu to develop it, and wanted Overlin to undertake the manufacture of a model; that Mr. Overlin accepted, and they returned to town. That Mr. Bilyeu advertised for a draftsman, and put him to work in the Ainsworth Building; that the model was constructed and that a month or six weeks after that time Mr. Bilyeu said to the witness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for wit-

nesses to make a better machine, and that Mr. Bilyeu said he could not do it. That the witness went east the 2nd day of May, 1910, and went first to the Comptograph Company, with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine. That he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910; that the second model was completed in 1912."

The witness was then shown photographs of the exterior of the machine, and identified them as photographs taken in August, 1910, and of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company.

II A.

That the Court erred in permitting the witness to testify relative to and demonstrating the latest Payograph machine to the jury over the objection of the defendant Gernert as follows:

Q. Will you take that machine and demonstrate it to the jury? (Witness proceeds to demonstrate.) Tell the jury what the machine is and what it is designed to do, and what it will do.

A. This machine here is not my invention, this machine is a stock adding machine made by the Wales Company in Wilkesbarre, known as the Adding Machine Company. This coin paying device is

my invention and is connected to this adding machine, so that when the key is depressed here and this handle of the adding machine operated the money is ejected here into the hand or envelope; it is listed on the paper of the adding machine here, and is added on the wheels of the adding machine here. The connect and disconnect is at this point. There is a large operating lever. (Operating machine.) This is simply a connecting link from the coin paying mechanism to the adding machine. By taking out that thumb screw you disconnect all of the pay mechanism so that you can list and add without paying money, or without ejecting money, but when that link is attached by that thumb screw, then the operation of the adding machine also operates the paying machine over here, so that when you put down a key here and pull your handle, that amount will be ejected over here to the hand or envelope, recorded on the paper here and added on the wheels here. Whenever you wish to add and list without paying, as I have said before, take this thumb screw out and you at once have separated your adding and paying mechanism, or the machine can be lifted bodily from this and the adding machine taken off to other parts of the office and used independently of this.

Q. In other words, the machine is so constructed that you can use the adding machine with or without the coin paying mechanism?

A. Yes, sir.

Q. And they are detachable?

A. Detachable, yes.

Q. And so arranged that by the manipulation of this screw or device on the end of the machine the adding machine either will or will not work in conjunction with the coin paying mechanism?

A. That is right.

Q. In other words, to make it plain, if you are using the adding machine as such, by handling it in the manner you have described, you could mark the number of figures by depressing the proper keys indicating the proper amounts, and that would add into the adding machine, without working the coin paying mechanism at all.

A. Yes, sir.

Q. And then by replacing that screw, the adding machine would perform exactly the same work, and in addition to that the proper amount of change would be paid out of the coin paying mechanism?

A. That is right.

Q. Now, what is the feature of novelty about that arrangement and about that machine—what is the main feature of novelty?

A. The ability to separate the adding mechanism from the paying mechanism is one of the principal objects.

Q. Now, to what sort of adding machines can this coin paying mechanism be attached?

A. This coin paying mechanism has been attached to the Wales machine, to the Burroughs machine, and can be adapted to and attached to any regular type of adding machine.

Q. Do I understand you then that in the marketing of the machine you could simply sell the frame of the coin paying mechanism and they would connect it on to the regular adding machine, without the necessity of purchasing an adding machine?

A. This one here could be. This one would have to be taken into the shop and the key stems extended; that one there is a stock machine connected with the other machine.

Q. The machine you have been demonstrating now is the first model?

A. That is the first model.

Q. Have you the latest model of the payograph machine?

A. This is the latest model.

Q. Now, demonstrate to the jury the latest model.

A. This here is what is termed the Burroughs Visible Adding Machine; this here is the payograph with the extension or mezzanine keyboard, so that when you depress a key here you set the mechanism not only for the paying but also for the adding machine beneath, and pressing the corresponding key of the adding machine; then when you operate the handle here you not only list and add on the adding machine, but you pay that amount over here; this can operate independent on this, that is the adding machine independent of the coin paying, simply by changing this button on this side. With it in position it would pay, list and add; with the button

turned that way, it would add, list, but would not pay. Then this machine, the adding machine, can be taken out bodily from beneath and used as an ordinary adding machine about the office the days they don't wish to pay off.

Q. Now, what is the feature of novelty in that machine, Mr. Oviatt?

A. The principal feature is the same as in that, ability to separate your adding mechanism from your paying mechanism.

Q. You claim to be the inventor of any part or portion of the adding machine?

A. No.

Q. What adding machine do you use in connecting your machine to it?

A. We are using right here the Burroughs.

Q. What is the reason, the main reason, for simply connecting your machine to it, instead of making an adding machine of your own?

A. Well, there are many reasons. One reason is that we don't care to go into an experimental field and take our chance to patent suits with the adding machine companies. We also wish to avoid the expense incidental to the manufacture of adding machines. We get the support of the adding machine company and salesmen rather than their non-support. Furthermore, any company as a rule which has employees enough to warrant the using of a paying machine of this type already owns an adding machine. They pay off once a week as a rule, and by attaching to the adding machine which they

already own they are saved the expense incidental to buying a complete adding mechanism, which we might otherwise have to devise and build into the machine.

Q. In other words, a company to whom you might want to sell already owning an adding machine would not have to buy the complete outfit?

A. No.

Q. Now to what machines, Mr. Oviatt, can you—to what sorts of adding machines and kind of adding machines can the payograph be attached, and from which it can be detached?

A. We can attach to the Wales, Burroughs, White, made in New Haven, Connecticut, to the Universal; that is owned by the Burroughs. That is practically all of the machines in the market having the ordinary type of keyboard.

Q. What is the fact as to whether or not the adding machines you have mentioned are the principal adding machines that there are being manufactured and sold in the United States?

A. There are only two principal adding machines, that is the Burroughs and the Wales, at the present time. The White in New Haven hasn't attained very much publicity.

Q. Now is it—this machine that you have demonstrated before the jury, this last machine, Mr. Oviatt that is in interference with the machine of the United States Cashier Company, known as the Bank Cashier?

Mr. Pipes: Now, may it please the court, that still raises the question.

Mr. Reames: I won't insist upon it until I present my point."

To the overruling of said objection the defendant Gernert was duly and regularly allowed an exception.

III.

That the Court erred in admitting in evidence over the objection of the defendant Gernert, as proof of the overt acts alleged in the indictment each and every of the letters set out in the indictment as overt acts numbers one to sixteen, inclusive:

Mr. Reames: I am now about to offer in evidence Government's Identification 115, which forms the basis of overt act No. 1, a letter written by Mr. Bonnewell. I have a stipulation with Mr. McHenry to the effect that the letter was written by Mr. Bonnewell and mailed, and I want him here before I introduce it.

Mr. Maguire: Before the Government offers in evidence any evidence of overt acts, I would like at this time that the Court require the United States Attorney to declare whether he elects to prosecute these defendants for a violation of Section 37 of the Penal Code, or for a violation of Section 215 of the Penal Code. The indictment is drawn in such a general manner that there will be difficulty in determining whether it is a violation of Section 37, or a violation of Section 215, and in order that the de-

fendants may preserve the record, it seems to me at this time we are entitled to know from the District Attorney upon which section he elects to proceed.

Mr. Reames: As stated in my opening statement to the jury and as stated in the indictment itself, this is an indictment for a violation of Section 37 of the Penal Code.

Mr. Maguire: Does the United States Attorney contend that the various overt acts set out in the indictment were the overt acts referring to, and in pursuance of the particular conspiracy set out in that indictment?

Mr. Reames: Yes.

Mr. Maguire: Refer to no other.

Mr. Reames: Yes, the ones attempted to be proven at this time.

Mr. Maguire: There have been offered and received numerous exhibits from Exhibit 120 to Exhibit 272, consisting of letters purporting to have been signed and mailed by the United States Cashier Company and by Mr. LeMonn as its sales agent, and Mr. Menefee as its president. Do I understand that it is the contention of the Government that these letters were written and mailed in the United States mail?

Mr. Reames: Yes.

Mr. Maguire: That is a matter of record now, so we may proceed and rely upon it?

Mr. Reames: Yes. The evidence of the Government has offered as to the manner in which these exhibits came into our possession, and the Government now claims it is proved by circumstantial evidence that these letters and various exhibits referred to by counsel were written and mailed in the United States mail in the ordinary course of business.

Mr. Maguire: And were mailed and relate to and refer to the particular conspiracy set out in the indictment?

Mr. Reames: Yes.

Mr. Maguire: And were in execution of that particular conspiracy?

Mr. Reames: I think so. The next is Government's Identification 212. That is the one identified by the witness Klein as having been received by him in New York City.

Mr. Pipes: No objection to the identification on our part.

Mr. Reames: Then may we have the admission that on July 23, 1912, Mr. Frank Menefee, either deposited or caused to be deposited this letter of date July 23, 1912, in the United States mails at Portland, Oregon, and at that time it was enclosed in an envelope, and had its postage fully prepaid?

Mr. Pipes: Yes.

Mr. Reames: The Government then offers in evidence letter of date July 23, 1912, Government's

Identification 212, identified by the witness E. Klein when he was on the stand, as having been received by him at New York City, a few days after July 23, 1912, and the Government offers it as forming the basis of Overt act No. 2.

Mr. Maguire: On the part of the defendant Gernert objection is offered to this testimony on the ground that it is not an overt act for the purpose of executing the conspiracy set out in the indictment, for the reason that assuming the Government's contention to be true, and the allegations of the indictment to be true, the conspiracy, if any has been fully executed and terminated and performed, at least as early as June, 1911.

Now, may it please the Court, the defendants in this case are charged not with having devised a scheme to defraud, not with violation of Section 215 of the Penal Code, but with having conspired to commit an offense against the United States. The District Attorney has conceded that all the letters which have been offered in evidence, and which he claims, and which of course for the purpose of this argument is admitted, went through the mails, were written and mailed for the purpose of executing the scheme to defraud, which he has set out and alleges to be true, in his indictment. Now, the gist of that offense is not in promoting of the scheme, but it is in the use of the mails to carry out an alleged scheme to defraud. The defendants are charged in this indictment with having conspired and confederated

together to commit that particular offense; that is the offense of placing a letter in the mails for the purpose of executing the particular scheme to defraud set out in this indictment. Now, when that offense, that is, when the objects of the conspiracy have been consummated, there can be no further acts committed by any one, to be charged in the indictment or to be offered or admitted in the evidence, for the crime, if any, has been committed.

COURT: This indictment charges a continuing conspiracy.

Mr. Maguire: Quite so, Your Honor. And under the continuing conspiracy the statute of limitations does not commence to run from the first overt act, but from the last overt act, but it must be an overt act for the purpose of committing the particular offense set out in the indictment. Now, the particular offense set out in the indictment is the use of the mails for the purpose of defrauding, the mailing of a letter, rather, to carry out a scheme set out in the indictment, and the District Attorney says that the scheme had been formed in September, and that these particular letters set out in 1911 and offered in 1911, were for the purpose of executing the scheme. Now, the conspiracy must have existed in the minds of the defendants prior to the devising of the scheme and when that offense was completed or committed, if any at all—of course, I merely assume that for the purpose of this argument, because it is in effect a demurrer to this evidence, and to the

indictment—when that was completed, then there was nothing further to do. Now, let's take this state of facts, that counsel has put in here. He said that these defendants got together in September, 1910, for the purpose of devising and executing a scheme to defraud. Now, that offense was committed, and that conspiracy was consummated, at the time the first letter was placed in the mails for the purpose of executing the scheme. Now, any further acts, any further mailing of letters, were separate and distinct offenses. Any agreement or conspiracy was a separate and distinct conspiracy. Any agreement or conspiracy was a separate and distinct conspiracy, and cannot be joined in the same count of the indictment, and it is a question whether they are permissible to be charged in the same indictment, and unquestionably that cannot be done in the same count of the indictment. Therefore, under the District Attorney's own admission these particular letters did not refer to completing and committing an offense, if any offense at all was committed.

Argument of Counsel.

COURT: I understand your position, and I don't think it is necessary to take up any more time on it. I have ruled on that question a good many times, and as long as the indictment charges a continuing offense, as it does in this case, I think it is competent for the Government to give in evidence any act that may be selected by it as an overt act, providing it has charged a continuing conspiracy,

and I don't think the first overt act terminates the conspiracy so the objection will be overruled.

MR. MAGUIRE: Save an exception.

MR. PIPES: That applies also to all the other defendants.

COURT: The same objection goes to all the defendants, and an exception.

Whereupon, the United States of America offered in evidence each and every letter set forth in the indictment as overt acts being therein numbered as overt acts I to XVI, to the admission of each of which for the reason hereinbefore set forth the defendant Gernert duly made objection, which objection was overruled by the Court. To the action of the Court in overruling said objection and in admitting said letters in evidence as proof of the overt acts set out in the indictment, the defendant Gernert was allowed an exception.

IV.

That the Court erred in refusing to grant defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert, for the reason that the indictment does not state facts sufficient to constitute crime.

V.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to Defendant

Gernert, for the reason that the indictment charges more than one crime.

VI.

That the Court erred in denying and overruling the defendant Gernert's motion to the Court to direct jury to return a verdict of not guilty as to the defendant Gernert for the reason that there is no evidence tending to show formation of any conspiracy described in the indictment.

VII.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that the evidence does not show any confederation, agreement or conspiracy on the part of the defendant Gernert with the defendants named in the indictment.

VIII.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to defendant Gernert for the reason that the evidence showed that the conspiracy, if any, was terminated and completed more than three years prior to the finding of the indictment.

IX.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that upon the face of the record

it appears that none of the overt acts which appear in the indictment were committed prior to the termination of the conspiracy and effectuating its said object.

X.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that it appeared from the face of the record that the defendant Gernert was not associated with the conspirators named in the indictment nor employed by the United States Cashier Company within three years of the finding of the indictment.

XI.

That the court erred in denying and refusing to give the following instruction #3 requested by the defendant O. E. Gernert

"Again, even though you should find from the evidence that fraud or injury resulted from the acts of one or more of the defendants and was brought about or executed in whole or in part by use of the mails, yet, if you would not find that there was an agreement or understanding between the defendants and all of them to devise such a scheme and to execute it in the manner hereinbefore alleged, then you must find the defendants not guilty."

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XII.

That the Court erred in denying and refusing to give the following instruction #4 requested by the defendant O. E. Gernert:

“Gentlemen of the Jury: You are further instructed that it is not sufficient for the government in this case to show that certain of the defendants combined to perform certain acts and some one or more combined with others to perform different acts, even though the defendants had a similar purpose in view, but the evidence in this case must show beyond a reasonable doubt that each and all of the defendants agreed and conspired together to do these things.”

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XIII.

That the Court erred in denying and refusing to give the following instruction #6 requested by the defendant Gernert:

“The existence of a conspiracy cannot be established as to one of the defendants by the acts or declarations of another defendant committed in his absence and without his knowledge or concurrence, nor can the connection of a particular defendant to a conspiracy be established or proved by what is said or done by another person alleged

to be a co-spirator. Therefore, in determining whether or not there was a conspiracy and whether or not any particular person was a party to such conspiracy you are limited to the things done by him, and unless you find beyond a reasonable doubt from his debts that he had an intent to defraud and that he had knowledge that the Company did not have, own or control the patents which it claimed to have and that he knew the Company did not intend to manufacture such machines (if you find from the evidence it was not their intention so to do) and that he knew that the Company did not have bona fide orders for its machines and that he knew that the Company would not make large profits and that he knew that the financial condition of the Company was not excellent but was insolvent and that the liabilities of the corporation greatly exceeded its assets and that he knew that the stock by reason of these things was worthless. In other words the government has alleged in the indictment that the stock in this corporation was worthless by reason of certain alleged facts and conditions which it sets out in detail, and before you can find any particular defendant guilty under this indictment it will be necessary for you to find beyond a reasonable doubt that such defendant knew that the stock of the Company was worthless because of the particular matters which the government charges.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XIV.

That the Court erred in denying and refusing to give the following instruction #7 requested by the defendant O. E. Gernert:

“The mere fact that any one of the defendants may have made statements which were false or misleading in order to induce others to purchase stock in this corporation, would not of itself justify you in finding him guilty of the crime of conspiracy as charged in this indictment unless you further find that the defendant made such statements knowing that the stock he was offering for sale was worthless.”

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XV.

That the Court erred in denying and refusing to give the following instruction #8 requested by the defendant:

The mere assertion by a salesman that certain stock offered for sale was Company stock instead of personal stock would not justify you in finding such salesman guilty of the crime charged in this indictment. There is no difference between Com-

pany stock and personal stock, it is all stock in the United States Cashier Company, and if such salesman at the time of making such representations did not know or have knowledge of the matters which the government alleges rendered said stock worthless, but believed said stock to be valuable, then no presumption of fraudulent intent would arise and said defendant would not be guilty of the crime charged and you should find such defendant not guilty.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XVI.

That the Court erred in denying and refusing to give the following instruction #10 requested by the defendant Gernert:

You are further instructed that so far as the stock salesmen were concerned they were and are not officers of the Company and they stood in no fiducial relation toward its stockholders or toward such persons as it might be their duty in the course of their employment to endeavor to induce to purchase stock of the Company, and such salesmen had the right to freely contract with the Company and had the right to obtain the best contract they could for themselves without being guilty of fraud or wrong doing, and the mere fact, if you shall find it to be a fact, that they received a large commission,

is not of itself any evidence of fraud or wrong doing on their part. They had a right to place whatever value they might desire upon their services and to obtain and make the best bargain they could with their prospective employers. The business of selling stock in a corporation or obtaining subscriptions to the same is a legitimate business and there is no presumption or suspicion of any kind against a man who engages in such business.

Exaggeration or puffing of the value of an article or enterprise does not constitute a crime and is not criminal or fraudulent unless the person making such statements intends thereby to defraud the purchaser.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XVII.

That the Court erred in denying and refusing to give the following instruction X-A requested by the defendant Gernert:

There is no presumption from the fact that a statement is false that it was made with a fraudulent intent.

Southern Devp. Co. v. Silva, 125 U. S. 248.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XVIII.

The Court erred in denying and refusing to give the following instruction #XI requested by the defendant Gernert:

It is incumbent upon the government to show that the representations or statements made by any one of the defendants were not only untrue but that the defendant knew them to be untrue, and in addition to those two elements intended thereby to injure and defraud.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XIX.

The Court erred in denying and refusing to give the following instruction #XII requested by the defendant Gernert:

There is no presumption of fraud from the fact that a glittering and glowing promise may have been made and not carried out, unless it shall appear that the person who made such promise knew at the time of making the same that it could not be carried out and would not be carried out.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XX.

That the Court erred in charging the jury as follows:

The indictment charges that the alleged fraudulent scheme was to be carried out and executed by certain specific false representations. It is not incumbent upon the government to prove that all of the means set out in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that any of them were actually used or put into operation. It is sufficient if it be shown to your satisfaction, beyond a reasonable doubt, that the conspiracy was entered into for the purposes indicated, and that one or more of the means described in the indictment were to be used to execute it, and that, during the continuance of the conspiracy, the alleged overt acts, or some one or more of them, stated in the indictment were done by one or more of the conspirators to effect the object thereof.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXI.

That the Court erred in charging the jury as follows:

In order for one person to defraud another, it is not necessary that he should bear any malice or ill-will toward such person. If the defendants in this case agreed together that they were to sell the

shares of stock in this corporation upon and on account of false and fraudulent representations, which they would make knowing these representations would be false and untrue, and knowing that they would be made for the purpose of deceiving the investors and the public as to the true condition and value of the shares of stock, then the law would imply that they intended to defraud all of the persons who should buy shares of stock from them, or from the Cashier Company, relying upon such representations.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXII.

The Court erred in charging the jury as follows:

It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises, if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate

intent to make the business of the corporation a success, or the ultimate belief of the defendants that they would finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXIII.

That the court erred in charging the jury as follows:

In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business of the corporation a success, or how confident they may have been that they would be able to return that money without loss, or without profit, because the representation which they would have agreed to make would be for the purpose of getting the money in a wrongful way and they could not, un-

der such circumstances make them rightful by pointing to some ultimate good intent.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception is allowed by the court.

XXIV.

That the Court erred in charging the jury as follows:

The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful and his intent to pay it back without loss cannot cancel the wrong. So in this case if the defendant by means of the false and fraudulent representations set out in the indictment agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXV.

That the Court erred in charging the jury as follows:

The law presumes that every man intends the logical and natural consequences of his own wrongful acts. Applying this rule to the case at bar, if you believe from the evidence, and beyond a reasonable doubt, that these defendants agreed among themselves that they would sell to the public and to these investors the shares of stock of the United States Cashier Company, under the false and fraudulent representations set out in the indictment, or some of them, then you would be justified in finding that the defendants agreed to defraud the investors and the public, notwithstanding the fact that you also might believe that the defendant really believed that the value of the stock would be ultimately such as to return to the investors a profit instead of a loss.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the court.

XXVI.

That the court erred in charging the jury as follows:

It is not necessary in this case in order to convict one or more of the defendants that you should be satisfied that each of the defendants knew or understood all of the fraudulent representations, promises or pretenses that were to be made, if any were to be made, if one of the defendants at any time prior to the period of three years from the date of filing the indictment and prior to the time when

any overt act set out in the indictment was committed agreed with another of said defendants that they would act jointly in carrying out the alleged fraudulent scheme set out in the indictment, and in selling the stock of the corporation representing that the money to be received from such sale was to go into the treasury of the company to be used by it in building factories, knowing that the shares of stock, which were to be offered for sale, were in truth and in fact the privately owned stock of another of the defendants and that none of the money would go into the treasury of the company, and you further believe from the evidence that some of the false and fraudulent pretences and promises set out in the indictment were to be used by the defendant for the purpose of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell their stock in such manner and under such false representations, were parties to the conspiracy.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXVII.

That the Court erred in charging the jury as follows:

If you believe from the evidence that the original purpose of the defendants was legitimate, and you further believe from the evidence that they believed in the future of the United States Cashier Company

and believed that it would ultimately pay dividends to the investors, and you believe from the evidence and beyond a reasonable doubt that they deliberately agreed together to take advantage of the public interests between a meritorious invention in order to sell to the public shares of stock by the false and fraudulent representations set out in the indictment, if they were false, then you would be justified in finding that the defendants intended to defraud the persons to whom they should sell such stock.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the Court.

XXVIII.

That the court erred in charging the jury as follows:

In determining whether or not the defendants intended to defraud the investors of the money by selling to them the shares of stock of the corporation, you have a right to take into consideration the question of the commissions which the evidence shows, or tends to show were received by the defendant or any of them, from the proceeds of the sale of this stock.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the Court.

XXIX.

That the court erred in charging the jury as follows:

Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among other things, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of direct or circumstantial evidence, the aid of which is constantly required not merely for the purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, great latitude is allowed in its admission, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered may, by their number and joint operation establish or corroborated by minor circumstances be sufficient to constitute conclusive proof. And where fraud in the purchase or sale of property is in issue evidence of fraud of like character committed by the

same parties at or near the same time, is admissible, on the ground that where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceed from the same motive.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXX.

That the court erred in charging the jury as follows:

The indictment charges that the conspiracy was formed in September, 1910. The date is not material. It is sufficient if it was formed sometime prior to the overt acts charged in the indictment and continued and in existence at the time of such acts.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception was allowed by the Court.

POINTS AND AUTHORITIES.

I.

The mailing of each letter for the purpose of executing the scheme or artifice to defraud is a separate and distinct offense under Section 215 of the Penal Code.

In *Re Henry*, 123 U. S. 372, 374.

Re DeBara, 179 U. S. 320.

II.

A separate count charging a conspiracy to violate the statute may be predicated upon each letter mailed to execute the scheme or artifice described in the indictment.

Francis vs. U. S., 152 Fed. 155.

III.

Separate and non-concurrent sentences may be given on each count charging a conspiracy and based upon each letter mailed.

Francis vs. U. S., *supra*.

IV.

The crime charged in the indictment is not a violation of Section 215, Penal Code, but of Section 37, viz.: a conspiracy to commit a crime against the United States.

V.

A separate charge of conspiracy could have been predicated upon each overt act described in the indictment and each count would have been a complete offense. The indictment therefore charges sixteen separate and distinct crimes.

VI.

The stipulation of the United States Attorney that the letters written in 1910 and 1911 were written and mailed for the purpose of executing the PARTICULAR conspiracy charged in the indictment is an election and establishes the fact that the crime charged was committed more than three years prior to finding of the indictment.

VII.

Likewise the overt acts set out in the indictment could not have been committed for the purpose of executing the conspiracy, which, under the United States Attorney's stipulation an election had already been consummated.

U. S. vs. Ehrgott, 182 Fed. 267, 273.

VIII.

No act can be construed to be an overt act which takes place after the termination of the conspiracy charged in the indictment.

Lonabaugh vs. U. S., 179 Fed. 476, 478, 481.

Ex parte Black, 147 Fed. 832, 834.

U. S. vs. Burke et al., 218 Fed. 83, 84.

IX.

It is error for the trial court to invade the province of the jury and assume the existence or non-existence of disputed facts.

1 Blashfield on Instr. to Juries, 234.

X.

The question of the intent of the defendants, their belief in the success of the enterprise, and as to whether the representations made were false and fraudulent were all disputed questions of fact. The court, in instructing the jury, assumed that they had been established by the Government and removed them from the consideration of the jury.

XI.

In closely contested cases it is error for the trial court to refuse to give the instructions which present the defendant's theory of the law and the case.

Burton vs. U. S., 196 U. S. 283, 306, 307.

XII.

The testimony of the witness Oviatt was incompetent as to anyone other than Bilyeu. Gernert objected to the same, his objection was overruled, and an exception allowed. Afterward the court directed the jury to find Bilyeu not guilty. The testimony there-

upon became inadmissible and incompetent, but it was permitted to go to the jury. This constitutes error.

Boyd vs. U. S., 142 U. S. 450, 457, 458.

XIII.

It was not necessary that the defendant Gernert request the court to instruct the jury that the Oviatt testimony was not to be considered by them. His exception and the ruling of that court on the admission of the testimony was not thereby waived.

Boyd vs. U. S., *supra*.

XIV.

In the United States court when error is apparent in the record it is presumptively injurious to the party against whom it was committed unless it appear that the error did not and COULD NOT prejudice the rights of the party.

Williams vs. U. S., 158 Fed. 30, 35, 36.

Vicksburg R. R. Co. vs. O'Brien, 119 U. S. 99.

Deery vs. Gray, 5 Wall. 795, 807.

Sprinkle vs. U. S., 150 Fed. 56, 59.

Gilmer vs. Higley, 110 U. S. 47.

Boston &c. Co. vs. O'Reilly, 158 U. S. 334, 337.

McElroy vs. U. S., 164 U. S. 76, 80, 81.

XV.

The submission to the jury for consideration of extraneous issues or evidence which is neither relevant or material to the question upon trial is a violation of the defendant's rights and constitutes error.

Sparks vs. Terr. of Okl., 146 Fed. 371, 373.

XVI.

There is no testimony that the defendant Gernert knew any of the facts and conditions which rendered the stock worthless or that he knew of the existence or confederated in any conspiracy.

XVII.

Whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed. An inference cannot be based upon an inference.

Manning vs. Ins. Co., 100 U. S. 693, 697.

U. S. vs. Ross, 92 U. S. 281, 284.

State vs. Hembree, 54 Ore. 463.

XVIII.

Proof of the existence of a criminal intent on the part of the defendant Gernert was an essential element of the Government's case. In refusing to give defendant's

requested instructions VI, VII, VIII the court committed error.

People v. Wiman, 148 N. Y. 29, 32, 33.

People v. Wiman, 92 Sup. Ct. N. Y. 320, 330, 331, 332.

XIX.

Unless the Government's evidence is such as to exclude every reasonable hypothesis but that of guilt, the defendant is entitled to a verdict of not guilty.

U. S. vs. Richards, 149 Fed. 433.

XX.

The legal presumption is that the defendant was innocent of the crime charged and this presumption remains with him until removed by proof beyond a reasonable doubt of his guilt.

Union Pac. Coal Co. vs. U. S., 173 Fed. 737, 740.

XXI.

Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial

evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment of conviction.

Union Pac. Coal Co. vs. U. S., 146 Fed. 121,
123, 124;

U. S. vs. Richards, 149 Fed. 443, 454;

Hayes vs. U. S., 169 Fed. 101, 103;

U. S. vs. Hart, 78 Fed. 868, 873, 84 Fed. 826,
828;

U. S. vs. Martin, 26 Fed. Cas. 1183;

People vs. Ward, 105 Cal. 335, 341;

People vs. Murray, 41 Cal. 66, 67;

State vs. Hunter, 50 Kans. 302;

Bradshaw vs. State, 17 Neb. 147;

Duff vs. U. S., 185 Fed. 101, 102.

ARGUMENT.

The errors of which the defendant Gernert complains group themselves into three divisions.

1st. Those which go to indictment, and the overt acts which are charged therein.

2nd. Those which relate to the instructions of the court relative to the matter of fraud, and criminal intent.

3rd. Those which discuss the sufficiency of the evidence against the defendant Gernert.

The nature of the crime charged.

The defendants are not charged with having devised a scheme or artifice to defraud. They are charged with having conspired to commit an offense against the laws of the United States, namely to violate Section 215 of the Penal Code. This difference is real and not imaginary. If two men conspire to defraud another the conspiracy is continuous until the time that the fraud is accomplished. If, however, they conspire to commit an offense against the laws of the state their conspiracy has been consummated the very moment that the offense is committed.

The defendant Gernert contends

1. That inasmuch as the defendants are charged with having conspired to violate Section 215 of the Penal Code, that the offense was consummated the very instant that a letter was placed in or taken out of the mails.

2. That the mailing of each letter was a separate and distinct offense, and that the agreement, if any of the defendants to mail each letter was a distinct conspiracy.

3. That when the United States Attorney informed the defendant Gernert and the Court that the letters written in 1910 and 1911 were written and mailed by the defendants for the purpose of executing the *particular* conspiracy charged in the indictment; that such statement was an election on his part, relieved the defendants from the burden of offering any proof of that nature, made inadmissible the proof of the letters charged as overt acts in the indictment (which were all written later than December 31st, 1911), and established that as to the particular conspiracy charged in the indictment the statute of limitations had already run.

The authorities on this subject are clear on these points.

“We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment, ‘the act forbids, not the general use of the post office for the purposes of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet, or the taking out of a letter or packet from the post office in the

furtherance of such a scheme. EACH LETTER SO TAKEN OUT OR PUT IN CONSTITUTES A SEPARATE AND DISTINCT VIOLATION OF THE ACT.' It is not, as in the case of *In re Snow*, 120 U. S. 274, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated."

IN RE HENRY, 123 U. S., page 372, (374).

It must inevitably follow therefore that if the mailing of each letter is a separate and distinct offense, that an agreement to commit such offense is a violation of section 37 of the Penal Code, and the defendants could be prosecuted for an offense for each time they mailed or received a letter, and that a separate count for conspiracy would lie for each letter so mailed or received.

If, however, the position taken by the trial court and the United States Attorney is the correct one then it must follow that where the letters all relate to one general scheme to defraud, there could only be one conspiracy to mail such letters, only one count in the indictment, and only one sentence imposed.

Unfortunately, however, the courts have passed upon the matter, as the following citation discloses, and it is not open to argument.

"BUFFINGTON, Circuit Judge. This is a writ of error sued out by Stanley Francis to the District Court for the Eastern District of Pennsylvania. In that Court Francis was indicted with

others under Rev. St. Par. 5440 (U. S. Comp. St. 1901, p. 3676), on three indictments, each containing three counts, for conspiracy to commit an offense against the United States prohibited by Rev. St. Par. 5480 (U. S. Comp. St. 1901, p. 3697), as amended. The allegation in substance was that Francis and others, composing the Storey Cotton Company, conspired to devise a scheme to defraud persons by correspondence by inducing them to remit funds to invest in supposed cotton speculations, which speculations had in fact no existence. * * *

“On the trial the government withdrew two counts, and Francis was convicted on the remaining seven. The court imposed sentences upon him aggregating five years, divided as follows: Under indictment 44, two years; on the first count of No. 46, two years, to commence at the expiration of sentence No. 44; on the second count of No. 46, one year, to commence at the expiration of the sentence on the first count at No. 46. The sentence was to the Eastern Penitentiary. Thereupon Francis sued out this writ. The question raised under the various assignments may be considered under four heads, viz.: First, the legality of the counts under which sentence was imposed; second, the application of the statute of limitations; third, the testimony of one Quinlan; fourth, the legality of the sentence.

“With reference to the first question, it will be noted that in *re Henry*, 123 U. S. 373, 8 Sup. Ct. 142, 31 L. Ed. 174, followed in *Re De. Bara*, 179

U. S. 320, 21 Sup. Ct. 112 (45 L. Ed. 207), it was held:

“ ‘The act (section 5480) forbids, not the general use of the postoffice for the purpose of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet, or the taking out of such a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.’

“Now the counts here in question are each based on a letter mailed to a different person. Such mailing is a separate act, and, being done in pursuance of a scheme to defraud, constitutes an offense under section 5480. Such being the fact, it follows that a conspiracy to do that act was a conspiracy to commit an offense against the United States. This brings the case within the letter and spirit of section 5440, and warrants a charge of conspiracy to commit that particular offense. That act and offense constituting the basis of a conspiracy to commit it, it follows that an indictment therefor will not shield from indictment a conspiracy of the same person to commit another additional and separate offense, although of a like general kind, against the United States, the wording and spirit of section 5440 require such construction to fulfill its intent. We hold, therefore, that each of the counts before us covers a conspiracy indictable under section 5440.”

FRANCIS v. U. S., 152 Fed. 155.

In order that the Court may not lose sight of the record in this regard we quote as follows:

“Mr. Reames: I am about to offer in evidence Government’s Identification 115, which forms the basis of overt act No. 1, a letter written by Mr. Bonnewell. I have a stipulation with Mr. McHenry to the effect that the letter was written by Mr. Bonnewell and mailed, and I want him here before I introduce it.

“Mr. Maguire: Before the Government offers any evidence of overt acts, I would like at this time that the Court require the United States Attorney to declare whether he elects to prosecute these defendants for a violation of Section 37 of the Penal Code, or for a violation of Section 215 of the Penal Code. The indictment is drawn in such a general manner that there will be difficulty in determining except by the number put at the top of the indictment whether it is a violation of Section 37 or a violation of Section 215, and in order that the defendants may preserve the record, it seems to me at this time we are entitled to know from the District Attorney upon which section he elects to proceed.

“Mr. Reames: As stated in my opening statement to the jury and as stated in the indictment itself, this is an indictment for a violation of Section 37 of the Penal Code.

“Mr. Maguire: Does the United States Attorney contend that the various overt acts set out in

the indictment were the overt acts referring to, and in pursuance of the particular conspiracy set out in that indictment?

“Mr. Reames: Yes.

“Mr. Maguire: Refer to no other?

“Mr. Reames: Yes, the ones attempted to be proven at this time.

“Mr. Maguire: There have been offered and received numerous exhibits from Exhibit 120 to Exhibit 272, consisting of letters purporting to have been signed and mailed by the United States Cashier Company and by Mr. LeMonn as its sales agent, and Mr. Menefee as its president. *Do I understand that it is the contention of the Government that these letters were written and mailed in the United States mail?*

“Mr. Reames: Yes.

“Mr. Maguire: That is a matter of record now, so we may proceed and rely upon it.

“Mr. Reames: Yes. The evidence of the Government has offered as to the manner in which these exhibits came into our possession, and *the Government now claims it is proved by circumstantial evidence that these letters and various exhibits referred to by counsel were written and mailed in the United States mail in the ordinary course of business.*

“Mr. Maguire: AND WERE MAILED
AND RELATE TO AND REFER TO THE

PARTICULAR CONSPIRACY SET OUT
IN THE INDICTMENT?

“Mr. Reames: YES.

“Mr. Maguire: AND WERE IN EXECUTION OF THAT PARTICULAR CONSPIRACY?

“Mr. Reames: I THINK SO.”

(Abstract of Record, pp. 261, 264).

It is therefore apparent that during the course of the trial the United States stipulated with the defendant that the letters, Exhibits 120 to 272, (all written more than three years prior to the finding of the indictment) were written by the defendants, mailed by them in the mail in the regular course of business, and were written and mailed for the purpose of executing the particular conspiracy set out in the indictment. *In other words* THEY WERE OVERT ACTS FOR THE PURPOSE OF EXECUTING THE CONSPIRACY,
AND

Section 215 of the Penal Code was violated as separate and distinct offenses every time one of those letters were placed in the mail.

And inasmuch as the offense charged is that the defendants conspired to violate Section 215, and the Government had stipulated in open court that the letters written in 1910 and 1911 were written for the purpose of executing the PARTICULAR conspiracy charged in the indictment, it is equally apparent, that the object of the conspiracy, (which was to violate Section 215)

had already been accomplished some years back of the statute of limitations.

It is hornbook law that no overt act can be charged or proved which took place after the object of the conspiracy had been accomplished. And where the object of the conspiracy charged is the violation of the law of the United States, there can be no overt act after the particular statute has been violated.

“The defendants are clearly right in saying that the overt act cannot succeed the completion of the contemplated crime, and here the crime contemplated would have been completed as soon as the goods once got clear of the warehouse in Brooklyn, if I am right about the scope of section 2987.”

U. S. v. EHRGOTT, 182 Fed. 267 (273).

“But the dates of the several acts here cited were such that no overt act occurred within three years of the finding of the indictment, unless the issuance of the patents by the officers of the Land Department at Washington or some of the acts subsequently done by one or more of the defendants can be regarded as such an act.

“At the conclusion of the evidence, the defendants severally requested the Court to direct a verdict of acquittal upon the ground that the case made by the evidence was one the prosecution of which was barred by the statute of limitation. The request

was denied for reasons indicated in *United States v. Lonabaugh* (D. C.) 158 Fed. 314, exceptions were reserved, and the ruling is now assigned as error.

“The statute defining the offense is Rev. St. Par. 5440 (U. S. Comp. St. 1901, p. 3676), which reads:

“ ‘If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court.’ ”

“And the statute of limitation in Rev. St. Par. 1044 (U. S. Comp. St. 1901, p. 527), which declares:

“ ‘No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.’ ”

“While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (*Hyde v. Shine*, 199 U. S. 62, 76, 25 Sup.

Ct. 760, 50 L. Ed. 90) ; and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Lorenz v. United States*, 22 App. D. C. 337, 387; s. c. 196 U. S. 640, 25 Sup. Ct. 796, 49 L. Ed. 531; *Ware v. United States*, 84 C. C. A. 503, 154 Fed. 557, 12 L. R. A. (N. S.) 1053; s. c. 207 U. S. 588, 28 Sup. Ct. 255, 52 L. Ed. 353; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. 417, s. c. 212 U. S. 576, 20 Sup. Ct. 685, 53 L. Ed. 657. * * *

“Applying these decisions to the present case, it is plain that the title passed from the United States when the patents were executed and were recorded in the office of the recorder of the General Land Office at Washington, and that neither a physical delivery of them nor any further act was essential to make them perfect or effective. And recalling what has been said about the possession and the right of possession, we think it also is plain that the object of the conspiracy was effected when the title passed from the United States, and therefore, that what was done thereafter was not done to effect that object. * * *

"It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in the sense of the statute, is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured. See *United States v. Keitel*, 211 U. S. 370, 391, 20 Sup. Ct. 123, 53 L. Ed. 230."

LONABAUGH *v.* UNITED STATES, 179
Fed. 476, 478, 481.

"The facts of the case of *Ex parte Black* (D. C.) 147 Fed. 832, and 160 Fed. 431, 87 C. C. A. 383, relied upon by the demurrant, show that the payments relied upon by the government in that case as overt acts were made after the conspiracy had

been fully completed, and could not, therefore, have been to effect its object. In that case the object of the conspiracy was to effect a fraudulent entry of public lands. The acts essential to the conspiracy were the successive steps necessary to be taken in the land office to complete the entry. These steps had been taken and the entry completed long before the payments relied upon as overt acts were made. The statute of limitations had barred the acts constituting the entry, and the case was sought to be taken out of the influence of the statute by laying the subsequent payment of money, made after the conspiracy had successfully ended, as an overt act."

UNITED STATES v. BURKE ET AL., 218
Fed. 83, 84.

"The indictment must be read in the light of the facts. When so construed, this indictment breaks down. First, because the subject matter of the alleged overt act appertains to the conspiracy; second, because the alleged overt act took place after the conspiracy had been consummated; third, because the action is absolutely barred by the statute of limitations. * * *

"Second. The undisputed evidence shows that before the 3rd day of April, 1903, the date of the earliest alleged overt act, the conspiracy laid in the indictment had been consummated. There is a strange confusion in the averments of the indict-

ment as to dates and the sequence of events, whereby, upon the face of the indictment, it would appear that by the payment of \$200 to John B. Million, one of the entrymen, on the 4th day of April, 1903, he was induced and persuaded to make certain false and fraudulent entries which were 'then and there made,' etc. The witnesses of the government, and the tract book of the Land Office, show beyond dispute that each and every of these preliminary entries was made on the 7th and 8th of October, 1902. So that these entrymen must have been 'persuaded and induced' to undertake this scheme before that date. In like manner it is conceded by the government that the final proofs were made as to each and every of these tracts of land, the consideration thereof paid to the government, final certificates issued, and a conveyance taken from each of the entrymen, on or before the 17th day of March, 1903. Thereby everything was accomplished which was contemplated by the conspiracy, as laid in the indictment. Every step had been taken and had been ratified and approved by the officers of the Land Office, and a transfer secured of the fraudulent titles so acquired. The only overt acts to support the indictment are certain payments made to the entrymen between the 4th day of April and the 13th day of June, 1903, to carry out the agreement made in the preceding September, when they joined the conspiracy.

"AN OVERT ACT PRESUPPOSES A PENDING CONSPIRACY. So that the act of any one done in furtherance of the conspiracy, may

bind all of his associates. WHEN A CONSPIRACY HAS BEEN COMPLETELY EFFECTED, THIS IMPLIED AGENCY DISAPPEARS. *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown v. United States*, 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010. It is a contradiction of terms to speak of an act done to effect the purpose of the conspiracy after the conspiracy has been accomplished. Such an anomalous doctrine might prolong a conspiracy, and would keep it in active operation until every obligation incurred during the formative period of the plot had been liquidated. In *United States v. Donau*, 11 Blatchf, 168, Fed. Cas. No. 14,983, the function of an overt act is declared to be 'to show that the unlawful combination became a living active combination.' I believe no case can be found where the overt act postdated the consummation of the conspiracy. Where would be the locus penitentiae in such a case? So that, whether you consider the subject matter of the alleged overt act or its date, weeks after the conspiracy had been completed, the indictment discloses a desperate effort on the part of the pleader to confuse the distinction of the law, and to resuscitate a cause of action which, presumably, through the neglect of some one, has been allowed to lapse."

EX PARTE BLACK ET AL., 147 Fed. 832,
839.

The trial court in overruling the objection of plaintiff as to the admission of the proof of the overt acts charged in the indictment, and in denying the motion for a directed verdict, and in arrest of judgment and for a new trial, took the position that the indictment charged a conspiracy which was continuing in its nature, and that therefore the statute of limitations did not commence to run until the commission of the last overt act charged in the indictment.

In taking this position the trial court was in error. That error we believe arose from the fact that the learned judge misapprehended the nature of the conspiracy charged. The cases which he cited in support of his view were cases which involved a charge of conspiring to defraud the United States, or a conspiracy to affect an illegal combination in restraint of interstate commerce. In those cases the Supreme Court of the United States quite logically and correctly held that until the object of those several conspiracies, viz.: until the United States had been defrauded, or as long as the illegal combination was being effected, just so long did the conspiracy continue, and the statute would run from the last overt act.

But in the case at bar the United States Attorney was not content with the broad rules of evidence and doctrines of law which govern trials for violations of Section 215, but aimed at something even more extended and liberal, to-wit: the law of conspiracy. We are quite free to admit that if he had charged the defendants with "devising or attempting to devise a

scheme to defraud," that the statute of limitations would not commence to run until the scheme to defraud had been fully and completely carried out, and that every letter mailed would constitute a separate and distinct defense.

The gist of the offense with which the defendant Gernert was charged was that he conspired to violate section 37 of the Penal Code. The learned judge below lost sight of the fact that the very moment Section 37 was violated the object of the conspiracy was accomplished and the conspiracy terminated.

This was not mere empty, technical error on the part of the Court. If the United States Attorney had placed his offer on other ground, the rights of the defendant Gernert would have been vastly different, and he would have been under other obligation, and it would have been the duty of the Court to have given the Court vastly different instructions. If the U. S. Attorney had offered the evidence of letters, telegrams, circulars, etc., as proof of other conspiracies, tending to show guilty knowledge, intent or motive, the evidence might have been admissible against the defendant committing that act, but it would not have been evidence against his co-defendants, and they would have been entitled to an instruction from the court to that effect. By contending and stipulating that the letters, etc., related to and were in execution of the *particular* conspiracy charged in the indictment be made an election by which both parties were bound.

THE INSTRUCTIONS.

(Assignment XII.) The defendant Gernert complains that the instructions of the learned judge below to the jury on the question of guilty knowledge, fraudulent intent and criminal intent, were erroneous, and were prejudicial to him. It must be conceded that the defendants were guilty of no crime unless it appears that the stock which they were trying to sell was worthless or at least worth far less than the prices which they were selling it for. The indictment charges a conspiracy to devise a fraudulent stock selling scheme. All that the defendants sold or attempted to sell was stock, all the representations which they made, all the advertisements which they published were, so the Government claims, made for the sole purpose of selling stock, and to defraud the public by inducing them to believe that this stock was of great value and would produce large and lucrative dividends.

The very cornerstone of the Government's case must necessarily be that the defendants KNOWING that the stock was or would be worthless yet entered into a campaign for its disposal. Unless the Government demonstrates that the stock was worthless and that the defendants knew that it was worthless, it must be held to have failed in its case.

The defendant Gernert makes no claim but that the managing officers of the corporation, its directors, its president and its sales-manager were possessed of information relative to the company's affairs which rendered fraudulent any act of theirs in selling or attempting to

sell any of the stock. It was amply proven that the defendants Menefee and LeMonn knew that the company did not have the patents which it claimed to have, that the patent which it did have was in interference with another application for patent, that the financial condition of the company was not good, but that on the contrary it was close upon the reefs of insolvency, that the stock was not worth even par, that the orders which they advertised and proclaimed were not of the substantial nature which they represented. It must be conceded, however, that the Government did not offer any proof which even tended to show that the defendant Gernert knew any of those things which contributed to make the stock worthless.

**GERNERT NEVER HAD ANY KNOWLEDGE
OF THE FACTS WHICH RENDERED
THE STOCK WORTHLESS AND ITS
SALE A FRAUD.**

Does it require argument to demonstrate that he could not have been a member of a conspiracy to defraud when he did not know or suspect the essential elements which taken together made the scheme an artifice to defraud.

It was for these reasons that the defendant submitted the instruction which forms the basis of Assignment of Error XIII. The Court refused to give the instruction and thereby the jury were deprived of the defendant Gernert's defense.

If the Court was right in so doing, it would have been equally correct in telling the jury that a man who honestly believed that the company had patents to all of the machines which it advertised, who honestly believed that those patents were of great value, who honestly and sincerely believed that the company was about to engage in the manufacture and sale of the machines, who was sincerely of the opinion that by reason of the patents and manufacture and sale of the machines the shares of the company would be of great commercial value, and that large dividends would be paid thereon, who honestly believed that the company was the owner and in the possession of large bona fide orders for the purchase of its products, and that by reason thereof it would make a large profit, who was convinced that the financial condition of the corporation was excellent and that its assets greatly exceed its liabilities, to such an extent that the directors were justified in raising the price thereof from par to three times par, yet nevertheless he could be a member of a conspiracy to defraud.

Of course such a proposition would be absurd, yet in refusing to instruct the jury, as requested by the defendant Gernert, the trial court practically told them that.

The same issue arises in Assignments of Error XV and XXVI. The Court's error arose from confusing the doctrine that it is not necessary for every conspirator to know just what every other conspirator is doing or intends to do, with the principle that where one is charged with devising a scheme to cheat and defraud it is necessary and essential to prove that he knew the facts and conditions which made the fraud and cheat a possibility.

It is necessary under this indictment for the United States to prove that the defendant conspired to devise the scheme to defraud there described, and it is absolutely essential that it prove that he knew that the stock was of little or no value.

Again in its instructions the lower court committed grievous error as to this defendant. The Court invaded the province of the jury under the guise of instructing it as to the law, it undertook to remove from the jury's consideration several vital questions of fact.

That this action of the court constitutes highly prejudicial and reversible error should require no citation of authorities, yet in an abundance of caution we respectfully invite Your Honor's attention to the following principles of law as laid down by respectable authorities:

"It is a legal maxim 'that the court is for the law, and the jury for the fact,' and, as was noted in a previous chapter it is the exclusive province of the jury to determine the facts.

"Accordingly when material facts are in issue between the parties, and the evidence is conflicting as to such issues, it is error and a usurpation of the province of the jury to assume the existence or non-existence of such facts.

"This rule is elementary and familiar, and it makes no difference in the application of the rule whether one fact or several are assumed, or whether the assumption is direct or indirect.

“The court cannot assume the existence of facts if there is room for controversy even where the evidence is slight, although a verdict may be directed where the evidence would not sustain a contrary finding.” * * *

“The error in assuming a disputed fact as true is usually prejudicial, warranting reversal, but a different rule prevails where the error is invited by the complaining party, or where substantial justice has been done.”

1 *Blashfield on Instructions to Juries*, 234 et seq. (citing cases.)

The assignments of error referred to include two instructions in one of which appears the following statement:

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful?” * *

Now it is urged by the United States Attorney that what the court should have said was, ‘*Does this mean their intent that they could make, etc., “Does this mean their belief that they could make the enterprise, etc.”*

It may be that such a statement would have been proper, but the fact still remains that the court did not so state, and that to the lay mind the instruction was nothing more or less than a direction to the jury that such intent and belief did not exist in the minds of the defendants.

Counsel well remembers the feeling of incredulity and amazement that swept over him when he heard that instruction read to the jury. He could not believe that the Court would so flagrantly invade the province of fact, and yet here it was being done. There can be no question but that it had a great and prejudicial effect upon the minds of the jury. This instruction when taken in connection with the instruction assigned as error No. XXVI so far as the defendant Gernert was concerned absolutely denied him a fair trial and a just consideration of his case.

In that instruction the court said:

“* * * and you further believe from the evidence that some of the false and fraudulent pretenses and promises set out in the indictment were to be used by the defendant for the purposes of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell their stock in such manner and under such false representations were parties to the conspiracy.” (Abstract of Record, p. 369.)

Thus the trial court wipes out not only the question of the intent and belief of the defendants, but also *une-*

quivocally informs the jury that the representations and promises set out in the indictment were both false and fraudulent. There could be no clearer invasion of the province of the jury. Nothing of importance is left for them to decide. They are told specifically that the statements made by the defendants were both false and fraudulent, and in addition to that that the defendants were not even clothed with a belief that the enterprise could be made a success and that they intended to make it so.

It will not do for ingenious counsel to split hairs and point out distinctions that are not distinctions. The psychological fact of all trials is that the jury looks to the words of the judge, to his demeanor, to anything which he may say, do, or indicate, for the purpose of finding out what his opinion on the facts is. They realize that counsel for both the defendant and the United States are advocates, who in the heat of conflict lose their sense of proportion, and to whose statements but little heed need be given. The trial judge they consider as a being apart and above any interest in the subject of controversy, and whose opinions are entitled to great weight.

With minds so attuned, can there be any doubt but that the jury seized upon the trial court's statement on those matters as a safe guide to a proper determination of disputed questions of fact.

The thought we wish to convey is ably and succinctly stated in the following case from the United States Supreme Court:

“We think the court should have instructed the jury as requested by counsel for the defendant, and that its refusal to do so was error. Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours and been unable to agree upon a verdict. The requests to charge originally made by counsel for defendant had at that time been received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law. It does not appear from the bill of exceptions that defendant’s counsel then excepted to those remarks by the court, but when the jury subsequently returned into court and announced their inability to agree, counsel for defendant immediately saw the extreme importance of having the requests to charge made to the court regarded by the jury, not as abstract or general propositions of law, but as requests which affected the case then on trial with reference to the facts proved in the case; and so, before the jury again retired, they commenced to propound their requests upon the subject to the court, but the court before listening to them instructed the jury to retire, and then followed the colloquy above set forth between court and counsel.

“Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant’s guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in

order that the legal rights of the defendant should be preserved. Considering the attitude of the case as it existed when the jury returned into court for further instructions, we think the defendant was entitled, as matter of legal right, to the charge asked for in regard to the previous requests to charge, which had been granted by the court under the circumstances stated, and it was not a matter of discretion whether the jury should, or should not, be charged as to the character of those requests. A slight thing may have turned the balance against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the court, and when he asked for the assertion by the court of the materiality and validity of those requests which had already been made, the court ought to have granted the request."

BURTON v. UNITED STATES, 196 U. S.,
p. 283, 306, 307.

THE OVIATT TESTIMONY.

Assignments of Error II and IIa refer to the testimony of the witness N. C. Oviatt. One of the defendants was Thomas Bilyeu, and as to him the court instructed the jury to bring in a verdict of NOT guilty. Over the objection of the defendant Gernert the United States Attorney elicited testimony relative to conversations which the witness claimed to have had with Thomas Bilyeu long before the defendant Gernert was employed by the company, which were to the effect that the basic idea of the selector bar and ejector key idea was the invention of the witness and was stolen from him by Bilyeu, who afterward incorporated it in his patent; the witness was thereupon permitted to demonstrate before the jury a machine which was not even built during the time that the defendant Gernert was working for the Company, *and which had never been exhibited to any of the defendants.* The witness proceeded to tell the jury what he considered to be the advantages which his machine had over that manufactured by the United States Cashier Company, that it was in competition with it, and was even asked whether or not it was in interference with it in the United States patent office.

That this testimony was prejudicial to the defendants can admit of no question. It was offered by the United States upon the theory that they would subsequently connect the defendant Bilyeu with the conspiracy charged in the indictment. This the Government failed to do. This the defendants claimed from the beginning the Government could not and would not do. The de-

fendants objected and claimed that the testimony did not affect them, that they had no knowledge of it, that they should not be bound by it, and that the jury should not consider it.

The court, however, admitted it in evidence and permitted the defendant Gernert an exception to his ruling. Of course when the court allowed a motion for a directed verdict in behalf of the defendant Bilyeu the testimony became absolutely inadmissible for the reason that there was no showing that the facts ever came to the knowledge of any of the defendants whose case was submitted to the jury.

The court never instructed the jury to disregard the testimony, but counsel for the United States urges that no error exists for the reason that the defendant Gernert did not request the court to so instruct.

Counsel cites in support of his contention the case of

Itow vs. U. S., 223 Fed. 25, 28.

That case is not in point, however, for the reason that the testimony remained in the case until it was submitted, and was **AT ALL TIMES ADMISSIBLE** against the defendant Fushimi. We cannot believe, however, that if the court in that case had found that Fushimi was **NOT GUILTY** of the crime charged jointly against Itow and himself, the appellate court would have held that to permit the testimony to go to the jury was not prejudicial error.

On this question of what constitutes prejudicial error, the courts of the United States have spoken in terms that admit of no uncertainty.

“The charge made no reference to the robberies committed upon Brinson, Mode and Hall, except as they may have been in the mind of the Court, when it referred to ‘these other crimes.’ Whatever effect, prejudicial to the defendants, the proof of the robberies upon Brinson, Mode and Hall produced upon the minds of jurors, remained with them, except as it may have been modified by the general statement that the defendants were not to be convicted ‘because of the commission of these other crimes.’ The only crimes referred to in the charge (other than the alleged murder of Dansby) were the Rigsby and Taylor robberies. The jurors were particularly informed as to the purposes for which the court admitted testimony in respect to those two robberies; but they were left uninstructed, in direct terms, as to the use to which the proof of the Brinson, Mode, and Hall robberies could be put in passing upon the guilt or innocence of the particular crime for which the defendants were indicted. *It is true, as suggested by counsel for the government, that no exception was taken to the charge. But objection was made by the defendants to the evidence as to the Brinson, Mode and Hall robberies, and exception was duly taken to the action of the court in admitting it.* THAT EXCEPTION WAS NOT WAIVED BY A FAILURE TO EXCEPT TO THE CHARGE. If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the pecu-

liar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the Court. But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we

are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

BOYD v. U. S., 142 U. S., 450, 457, 458.

"The court, however, in our judgment, committed a radical error in charging the jury that:

" 'It is incumbent upon the defendant to show that he made these entries in a book prescribed by the internal revenue department, or to show that he made these entries as the law requires, upon a sheet of paper,' etc.

"It is the settled law in criminal procedure that the burden of proof never shifts from the prosecutor to the defendant. It remains throughout with the government. The plea of not guilty is unlike a special plea in civil actions, which, admitting the case averred, seeks to establish substantive grounds of defense. It is a plea that puts in contestation every fact essential to constitute the offense charged. And the benefit of a reasonable doubt in favor of the accused extends to every matter offered in evidence for as well as against him. *Glover v. United States*, 147 Fed. 426, 77 C. C. A. 450; 1 *Greenleaf's Evidence*, Par. 74, note; *State v. Wingo*, 66 Mo. 181,

27 Am. Rep. 329; Commonwealth v. McKie, 1 Gray (Mass.) 61, 65, 61 Am. Dec. 410. It is the rule of law of this jurisdiction, often repeated, that when error is apparent in the record, it was presumptively injurious to the party against whom it was committed, 'unless it appears beyond doubt that the error did not and could not prejudice the rights of the party.' Vicksburg R. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 229; National Biscuit Co. v. Nolan, 138 Fed. 9, 70 C. C. A. 436; State v. Russell, 90 Iowa, 569, 58 N. W. 915, 28 L. R. A. 195; People v. N. Y. C. Ry., 29 N. Y. 430; State v. Cooper, 45 Mo. 64.

"Without discussing the question suggested as to whether or not there was sufficient exception saved to this instruction, it is sufficient to say that in a criminal case where a plain error is committed in a matter vital to the defendant, especially in a case like this, where the defendant received the severe punishment of one year and six months in the penitentiary in addition to the fine, it is the province of the appellate Court to correct it. Wiborg v. United States, 163 U. S. 633, 656, 16 Sup. Ct. 1127, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726."

WILLIAMS v. UNITED STATES, 158
Fed. 30, 35, 36.

“The letter, however, was admittedly not in his handwriting, and the government should, therefore, before it can use that which was in itself incompetent as evidence either for the purpose of connecting Young with the commission of the crime or to procure and sustain a verdict against him, establish its case with that degree of certainty necessary to conviction with such letter excluded. This, we think, the government has failed to do. It is true that many circumstances of suspicion surround the petitioner, Young, and he may be guilty; but without the letter which forms the basis of the exception in question, and the answer thereto, and what was done as a consequence thereof, the defendant’s guilt is not established with that degree of definiteness and certainty that should be required in a criminal case. *This is particularly true under the federal decisions applicable to the admission and exclusion of evidence, which are to the effect that it should be made to appear beyond a doubt that the improper evidence admitted did not and could not have prejudiced the rights of the party duly objecting.* Deery v. Gray, 5 Wall. 795, 807, 18 L. Ed. 653; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Boston R. R. Co. v. O’Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; U. E. v. Daubner (D. C.) 17 Fed. 793; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 64 C. C. A. 180, 189, 129, Fed. 668; State v. Mickle, 81 N. C. 552; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; State v. Jones, 93

N. C. 611; State v. Goodson, 107 N. C. 798, 12 S. E. 329; Bishop New Cr. Proc. Vol. 1, Pars. 89, 92, 93 also 1273, 1274, 1275 and 1276, and cases cited.

“We find ourselves in the position that we cannot say that the admission of the letter in question may not have injuriously affected the defendant Young, nor can we say that the evidence against him, with such letter excluded, is sufficient to sustain the verdict against him.”

SPRINKLE ET AL v. UNITED STATES,
150 Fed. 56, 59.

“Every litigant has the legal right to a fair and impartial trial of the issues which his case presents according to the law and the evidence applicable to those issues alone. *The submission to the jury for their consideration of extraneous issues, or of evidence which is neither relevant nor material to the questions upon trial, is a violation of this right, and it constitutes a fatal error, because it tends to withdraw the attention of the jury from the issues actually involved, and to lead them to decide the case upon false issues, and in that way to reach an erroneous result.*”

SPARKS V. TERRITORY OF OKLAHOMA, 146 Fed. 371, 373.

“It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed, *but it is contended that the judgments as to the other three defendants should be affirmed because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued.* But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the Court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. *It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions.* The order of consolidation was not authorized by statute and did not rest in mere discretion.”

McElroy v. United States, 164 U. S. 76, 80, 81.

*Insufficiency of Evidence Against the Defendant
Gernert.*

**GERNERT'S MOTION FOR A DIRECTED
VERDICT, AND FOR A NEW TRIAL
AND IN ARREST OF JUDGMENT.**

As the Court instructed the jury in the case, the defendants must have been knowing participants in the conspiracy. The gist of crime was the alleged scheme to sell worthless stock by means of glittering representations of fact and promises of profits.

At the outset of the case it must be conceded that unless there was *scienter*, or guilty knowledge on the part of the defendant Gernert there could be no conscious participation in the conspiracy, and no intent to defraud.

That was a point which the United States must establish beyond a reasonable doubt and by competent evidence.

The defendant claims that as to that the Government utterly and completely failed. We do not believe that the United States Attorney will make any claim that there is proof tending to prove that.

The Government's case restly solely upon the following testimony:

C. B. Clark testified that in June, 1912, Mr. Gernert made a proposition to him that they could get the Washington agency for the sale of the company's ma-

chines by taking a thousand shares of the capital stock, of which the witness was to take a one-four part. That he afterward made arrangement to buy 100 shares of the stock and paid Gernert \$2500 for it, and *received a receipt showing that he had purchased the stock from Gernert*. He testified that Gernert told him that it was company stock and the money was to be used by the company, but that he understood that he and Gernert were afterwards to go into the market and sell it. He ascertained afterward that the stock which he received was from a personal certificate of the defendant Gernert. (Abstract of Record, pp. 149-163.)

Lew Paramore testified that in December, 1911, he purchased 50 shares of stock from Mr. Gernert and that at the time that Gernert told him the stock was treasury stock and that it was being sold to pay off the indebtedness then owing on the patents of something like \$50,000.00; that Gernert told him that the company owned all the patents to its machines, that dividends would be paid within the coming year and that he had no doubt but what the dividends would reimburse him for the amount he was paying for the stock, that the company expected to put its change making machines in the street cars at fifteen cents a day and that the profit accruing from that would pay the running expenses of the company. On cross examination, however, he admitted that the receipt given him (Defendant's Exhibit U) showed that he had purchased the stock not from the company but from O. E. Gernert, sales agent and *that the entire conversation he had*

with Gernert was limited to what the machines would do (about which the Government makes no contention).

It appeared that the stock that Paramore purchased was stock that had originally been issued to Mr. Overlin, the company's mechanical engineer, in payment of his salary, and by Overlin transferred to Frank Menefee.

John W. Zufall testified that he purchased ten shares of stock from one W. H. Bilyeu, and afterward saw Gernert and gave Gernert personally a note for the remaining amount of the stock. *Gernert made no representations of any kind to him.* (Abstract of Record, p. 214.)

G. H. Moore testified that in December, 1911, Mr. Gernert with other salesmen came to Leavonworth, Washington, that Gernert demonstrated the machine and informed several persons who came in to see the machine that the money derived from the sale of the stock was to build a factory, equip it with machinery to go ahead and make the machines. (The factory was in fact built, equipped and machines were being manufactured.) The witness bought ten shares of stock and gave his note for it, *which has never been paid.* The stock which Moore purchased and did not pay for came from a certificate which stood in the name of Frank Menefee. *That Gernert did not make any representations to him.* (Abst. of Rec., 216.)

The Government subsequently proved that the company never received any benefit from the transaction, which of course was not unnatural for the reason that Mr. Moore never paid for his stock.

W. A. Decker testified that in December, 1911, he purchased five shares of the stock from a man by the name of Malthouse, who was accompanied by a man named Muraine and someone whom he thinks was the defendant Gernert, but of whose identity he is doubtful. That he was told, but not by Gernert, that they were selling the stock to get money to finish paying off the payments and equip the factory with machinery to go ahead. That Muraine told him the Company would be paying dividends within two years. The receipt which he received shows that the third man was not Gernert but one Bilyeu. The witness further testified that he bought the stock on his faith in the machine and what it could do, and knew that the matter of paying dividends depended entirely upon creating a market for the machines and other elements. On cross examination the witness admitted that Gernert was not present when the representations were made to him relative to the stock.

Dr. C. R. Zener testified that he bought twenty-five shares of stock from one P. E. Muraine, and that Muraine (who was not on trial) told him that the money from the sale of the stock was to be used for the purpose of financing the building of the factory, installing machines, etc. *He did not testify to ever having seen Mr. Gernert.*

The Government subsequently proved that Dr. Zener's stock came from a certificate which stood in the name of Frank Menefee.

Mrs. Ollie B. Howard testified that in May, 1913, she had a conversation with Mr. Gernert in which Gernert claimed to be seeking a position as stock salesman in her company, the Swiss-American Milk and Chocolate Company, and informed her that he had trade his stock for \$100,000 in property and for a large sum of cash, that he further told her what it cost him for taxicabs, that he would ride them about the city, wine and dine them, and afterward in the "wee sma' hours of the morning" he would sign them up for the stock.

On cross examination she testified that Gernert thereupon was employed by the Swiss-American Milk and Chocolate Company and was Assistant Sales Manager of the Company, but admitted the execution of a affidavit to the effect that Mr. Gernert had never been an officer or employee of that company, that they had endeavored to secure his services, had printed his name on their stationery but had failed to obtain his services.

It was a remarkable fact, however, that the Government did not adduce any witnesses who had been induced to purchase stock as Mr. Howard claimed was the case, and that the books of the company revealed that the entire amount of salary, commission and traveling expenses which the defendant Gernert received from May, 1910, to the date of his severance from the company was some \$8,000.00.

C. F. L. Smith testified that he had a talk with Mr. Gernert about the company's machines; that Gernert told him what other companies had made with such propositions; gave him assurances that the United States

Cashier Company was as good as they, and that the company would more than likely pay large dividends in the near future and that he thought the stock would raise to \$100.00 per share.

Harry Wainright testified as to certain statements which were made to him by O. L. Hopson, not in Mr. Gernert's hearing or presence. That afterwards he saw Mr. Gernert several times and Mr. Gernert told him that he thought the company would have its machines on the market in 1912, the latter part of the year. That Gernert never told him anything about the patents.

Elmer C. Townsend testified that in October, 1911, he purchased twenty-five shares of stock from P. E. Muraine, that Muraine told him he was an agent of the Cashier Company, that the company had large orders for the sale of the machines and that Meier and Frank had an order for five hundred machines. *That Mr. Gernert was not present when Mr. Muraine made the representations*, but that he afterward met Mr. Gernert and gave Gernert a mortgage and later a deed to some lots in payment of the stock.

The Government later offered proof that the Townsend stock was issued from a certificate which stood in the name of Frank Menefee. It is not claimed, however, that any representation was made to Mr. Townsend that the stock was treasury stock.

This constitutes all of the oral evidence offered during a six weeks' trial against this defendant. The Government, however, offered the following documentary proof:

1st. That the stock sold to the witness as heretofore mentioned during December, 1911, was sold under an arrangement with Gernert that the proceeds of the sales should be accounted for by Menefee, LeMonn and Gernert each turning in one-third of their own certificates of stock.

2nd. That Gernert had not informed his associates that the stock being sold during that trip was personal stock.

There was nothing offered however to show that Gernert did in fact turn in any certificates on his account.

The United States further offered proof to the effect that on February 24, 1912, the defendant Gernert wrote to LeMonn asking him to send him a letter containing the following statements:

1. A promise to give a place on the Advisory Board to a representative of a syndicate which should purchase \$35,000 of stock of the corporation.

2. That he, LeMonn, would do his utmost to help Gernert get that 1000 machines for his, Gernert's, territory, machines Gernert wanted for his territory.

3. To say in a joking way that he never knew there were so many banks in the country as the letters show which are coming in daily asking about machines.

4. Also to state that one of the directors stated at luncheon the other day that they are figuring to keep

the wheels running 24 hours a day, 3-8 hour shifts in order to supply the great demand that he (Gernert) knows there is for our new born toy.

5. Also to state that the other two agencies are almost through with stock selling and if Gernert wanted to let them have what he had to sell to let LeMonn know, but that personally he would not do as it would mean that Gernert would have to lie idle for a month or two until the machines were ready.

LeMonn sent the reply that Gernert requested, practically word for word. There was no evidence however that Gernert exhibited the letter to anyone, or that he sold any stock of any kind whatsoever in California.

The foregoing constitutes all the evidence against the defendant Gernert, and is stated as strongly against him as the testimony warrants. We propose now to discuss for a little space the information which the company furnished Gernert relative to these representations which he made.

Early during the year 1911, the defendant Gernert was advised by the company of the following:

a. That the U. S. Cashier Company was the owner of the absolute rights in the United States for the manufacture and sale of Potter Cashier.

b. That in July, 1910, the Company purchased the American Cash Record Co. and obtained the sole rights of manufacture and sale of the Bilyeu Cashier.

c. That the Company was able to begin a manufacturing operations in a small way in the fall of 1910,

had turned out several of the Bilyeu Cashiers, that they have been thoroughly tested and are performing their work accurately and faithfully.

d. That the Company would be able to manufacture not only the Bilyeu Cashier but also other models from the same basic patent, together with a combined cash register and coin paying machine.

e. That the company had in its employ two of the most able mechanical engineers, *who had either patented or greatly aided in the perfecting of the different models.*

f. That the company had closed a deal for a large tract of real estate at Kenton which will serve as a site for a factory.

g. *That the company believed that it would be able to turn out machines in commercial quantities within six to eight months.* (Govt. Exhibit 248.)

On March 6, 1911, the Company advised Gernert that the stock would advance in price within a few days, but that such advance would not take place until it had gotten started toward building the new factory which they anticipated would be about the 15th of the month. (Govt. Exhibit 124.)

On May 29, 1911, the Company advised Gernert that the Board of Directors had ordered the price of stock advanced to not less than \$15.00 a share, and that the advance was justified from the following facts:

A. That the Company had developed the lightning change maker, and was demonstrating a section of the

computing machine, which development fully double the assets of the Company from a mechanical standpoint.

B. That they had let a contract for the erection of the first unit or section of the permanent factory, that the plans were perfected, and that ground would be broken a few days.

C. That the progress made towards establishing a Canadian factory had been so satisfactory that the success of it was assured.

D. That the Company had ordered several thousand dollars worth of machinery and had negotiations pending for machinery in a plant already established, which with the machinery already on hand would place the Company in the position to begin the active manufacture of machines in commercial quantities and that the making of dies and special tools will be carried on simultaneously with the construction of the factory.

E. That in addition to real estate the Company had in cash and bills receivable about \$110,000 which is ample to build and equip the factory, and that the remaining block of 5000 shares would be for a manufacturing fund.

(Government Exhibit 125.)

On June 5, 1911, the Company informed the defendant Gernert that the demand for machines was becoming so great that the board of directors had purchased an entire manufacturing plant that was in first class running shape. (Govt. Ex. 298.)

On June 19, 1911, the Company informed Gernert that it had purchased and paid for in full the entire manufacturing plant of the Gnu Copyholder Co. and that with this additional machinery the Company was now fully equipped to finish making the special tools and dies and ready to begin manufacturing in a commercial way and the Company will be enabled to take orders and make deliveries of the lightning change makers in thirty to sixty days and the Bilyeu Automatic Cashier in 90 to 120 days. (Govt. Ex. 128.)

On June 10, 1911, the Company wrote Gernert that their factory was running in good shape and that it was able to turn out on the average of about one lightning change maker per day and will be able to rapidly increase the showing from month to month and that it would not be long until the Company would be making machines in commercial quantities. (Govt. Ex. 251.)

On September 18, 1911, the Company informed the defendant that it had sold enough stock and that it had had sufficient assets to take care of factory, equipment and manufacturing fund, and that the balance of stock now for sale is the patent stock. (Deft. Ex. U.)

On November 10, 1911, the Company wrote Gernert that he had been with them long enough to know that if the stock was ever worth \$10 per share, when the Company had nothing but the cashier machine, that it is worth \$50 a share at this time when he considered the evolution of the machine into so many different and valuable devices. That admitting that the Bilyeu Cashier is a valuable asset to the Company and a big

dividend payer, the fact remains that every time it had a sale for the automatic cashier for banks or payrolls, it had beyond question of a doubt ten or twenty sales for its automatic change and computing machine, and this will sell at a higher price than the automatic cashier, the gross profits on the same will be correspondingly greater, hence these new machines the Company had brought out mean that it should earn five or ten times the profit what was ever possible with the first and only machine the automatic cashier. That the new factory in Kenton was in actual operation, and that it would be able to turn out some machines for the trade not later than January 1st, 1912, that the mechanical department had been given orders to rush work so that deliveries could be made in January without fail. (Deft. Ex. U.)

On December 20, 1911, the president of the Company wrote Gernert that the stock selling was so closely wound up that he intended to switch everything to re-sales as rapidly as it could be arranged. (Deft. Ex. U.)

On the same day another letter was addressed to defendant informing that the condition of the Company was certainly without parallel in any new corporation or manufacturing industry ever attempted in the West. That the Company has been financed in less time than any other on record for a like amount of money and it certainly could not be questioned that the Company had made wonderful progress in the way of building and equipping a factory and developing and constructing different classes of machines, to say nothing of the im-

provements on the wonderful automatic cashier, *which it will be able to deliver to the trade in February (1912).* (Govt. Ex. 157.)

On February 6, 1912, the following information was transmitted by the Company to the defendant Gernert: Our first commercial machine will be ready before the close of this month, which means that we are now practically starting on the sale and delivery of our machines. We are almost daily in receipt of unsolicited orders for these wonderful time and labor saving devices, and as previously advised I know from personal investigation on my recent month's trip to the Atlantic Coast that many of the largest corporations, such as the National Cash Register, Oliver Plow works, South Bend; West Lumber Co., Chicago; Baldwin Locomotive Works, Philadelphia, etc., etc., are making up their payrolls exclusively in coin, which proves that we have an unlimited market waiting us. We are working overtime in our factory, and even with this pressure will not be able to catch up with the present orders or make deliveries of any new ones before July or August. (Deft. Exhibit U.)

On February 19, 1912, a letter was written to Gernert advising him as follows: We have two syndicates now under way for \$25,000 each and if these come through it will mean an advance to \$50.00 thirty days earlier than we have anticipated and everything looks favorable that it is an even chance for these syndicates materializing. (Deft. Ex. U.)

The following statements were given to the salesmen for transmission to prospective purchasers of stock. (Defts. Ex. U.) :

Automatic Cashier.

Probable sale of machines with net earnings at \$200 per machine.

First year.	Second year.	Third year.
250 per month.	375 per month.	500 per month.
3000 per year.	4500 per year.	6000 per year.

Net earnings.

First year.	Second year.	Third year.
\$600,000 100%	\$900,000 150%	\$1,200,000 200%

In addition to the foregoing the Company had published and distributed a facsimile copy of a letter from John F. Robb, Patent Attorney, to the effect that the Bilyeu patents were unquestioned, and that they controlled the art.

In view of the admitted facts in the case, how can it be claimed that the defendant Gernert ever was a party to any conspiracy to violate section 215 of the Penal Code. Not only has the government failed to bring any proof that he knew or suspected the existence of the matters which were only known to the president, board of directors and manager of the Company and which made the stock worthless, but *the record affirmatively discloses that he was informed time and time again that the Company was in truth and in fact a manufacturing enterprise which had possibilities of growth and*

enrichment that quite equalled the record of the great manufacturing enterprises of the East and Middle West.

The position of the Government is that knowledge of all of these facts must be inferred from the testimony that on three isolated occasions the defendant sold stock to persons upon a representation that the same was Company stock when in truth and in fact it was his own personal stock.

That inference however cannot be drawn from the facts so testified to.

The United States Attorney asks this court to infer from the fact of that isolated misrepresentation that it was made with fraudulent intent; then from the inference that it was made with fraudulent intent, we are asked to infer that he must have known the facts relative to the patents, to the factory, to the manufacture and sale of the machines, to financial condition of the Company, and to the false financial statements, and finally we must pile inference upon inference and infer that beyond a reasonable doubt the defendant Gernert conspired with the various defendants named in the indictment, some of whom he had never seen, met or corresponded with, to violate section 215 of the Penal Code.

Such a course is undoubtedly without the sanction of any court of law and violates every sense of justice and fair dealing. A man entirely innocent of any crime might by this ingenious process be convicted of complicity with the most horrible violation of law.

Let me give an illustration of the vice of the Government's contention.

A is the president of a corporation which is perfectly solvent, which is and has been paying large and certain dividends, whose stock is worth beyond any question two dollars for every dollar invested. For private reasons, entirely divorced from the affairs of the corporation, it becomes necessary for A to raise money, and his only resource is to sell a portion of the stock he owns. He goes to B. He fears that if he tells B that the stock is his, A's personal stock, B will become suspicious of the value of the stock and will refuse to purchase the same, although A believes and it is the fact that it is worth more than the price A asks for it. A therefore represents to B that the company has some of its treasury stock that is for sale and that it would be a good investment for B. Upon this misrepresentation B relies and purchases the stock. He is not defrauded, it is worth all he paid for it, and all that he expected it would be worth, and A had no intention to defraud him although he lied to him.

Would any court or any jury ever hold under such circumstances that there was any fraudulent intent, or that A was guilty of a crime? Unquestionably not. Yet, if the position of the Government is correct such would be the decision, and so the lower court held in overruling the motion of the defendant Gernert for a directed verdict and in giving the instruction which is assigned as the XXVI error.

This matter of drawing inference upon inference has received the consideration of the United States Supreme Court in the following cases:

“No direct proof of such receipt was offered, as we have said. None was attempted. The defendant might have resorted to a *subpoena duces tecum* or to an order of the court to produce papers and books, or, perhaps, to a bill of discovery. He did neither. He simply proved, as a fact, that there were life policies in existence, secured through his agency, renewal premiums upon which stopped there, and he now complains that the jury was not allowed to presume from that fact that the renewal premiums had been paid to the plaintiff, and to presume it against a party who was not in the wrong, a party who had rightfully dismissed him from his agency, and who was under no obligation to collect the premiums at all. But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence. From the fact that a debt existed, it does not follow as a necessary or even reasonable sequence that it has been paid. Nor is there any presumption of its payment upon which a jury can act. Certainly none until after the lapse of twenty years. Much less can such a presumption arise in regard to the payment of renewal premiums upon policies of insurance such premiums not being debts due to the insurers, and not being collectible as debts. We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an im-

mediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in *United States vs. Ross* (92 U. S. 281, 284) we said: '*Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.*' Referring to the rule laid down in Starkie on Evidence, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Ev. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass v. Mitchell*, 35 Pa. St. 440.' * * *

"What the evidence did prove was, that there were policies in force on the 2d of June, 1871, the annual premiums upon which were \$87,000; that he would be entitled to commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the

company, and that these premiums were to be collected by his sub-agents and paid over by them. These were the primary facts. Everything more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely, that the renewal premiums were paid to the agents, and upon this a further presumption, that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidence of fact did not go far enough. We think, therefore, the court was not in error in withdrawing it from the consideration of the jury."

MANNING *vs.* INSURANCE CO., 100 U. S. 693, 697.

UNITED STATES *vs.* ROSS, 92 U. S. 281, 284.

The gist of the fraudulent scheme was that the defendants were to sell worthless stock. Unless the stock was worthless, or of little value compared with the price at which it sold, and **UNLESS THE DEFENDANT GERNERT KNEW OR SUSPECTED THAT FACT**, then as to him, the United States Cashier Company was not fraudulent and he could not be a member of a conspiracy. The question of his knowledge of the worthlessness of the stock is itself a inference which must be

drawn from evidence tending to show that the matters which the Government claims rendered it worthless were known to Gernert. *There is no proof that Gernert even suspected such a condition.*

Therefore there was nothing to be submitted to the jury and the Court should have instructed them to find a verdict of not guilty as to this appellant.

CRIMINAL INTENT.

The trial court entirely overlooked the matter of the criminal intent which must exist in the mind of the defendant before he may be said to be guilty of the crime charged. A well considered decision on that question is the following:

“The court was also requested by the defendant’s counsel to charge that ‘unless the jury find that the acts charged were committed with criminal intent, the defendant is entitled to an acquittal.’ The court replied, ‘I charge you unless the act was committed with intent to defraud, as I explained it to you, the defendant is entitled to an acquittal. I refuse to charge as requested.’ To this ruling an exception was taken by the defendant. During the summing up of the defendant’s counsel the judge was asked how he would charge upon the subject of criminal intent, and he replied: ‘I shall charge that the jury must find that there was intent to defraud; nothing about criminal intent.’ In the charge the Judge instructed the jury that there must be an intent to defraud in order to constitute the crime of forgery, and then defined the term, defraud, ‘to deprive of right, either by obtaining something by deception or artifice, or by taking something wrongfully, without the knowledge or consent of the owner.’

“Criminal intent is essential to constitute the crime, and the testimony bearing thereon is always a question for the jury. (Duffy v. People, 26

N. Y. 588-593; *Stakes v. People*, 53 N. Y. 164; *People v. Powell*, 63 N. Y. 88; *People v. Plack*, 125 N. Y. 324.)

“It follows that the Court should have charged as requested. It is urged, however, that the refusal to so charge did no harm, and that the charge as made sufficiently covered the ground. But we are of the opinion that the charge as made, taken in connection with the remarks of the court and its refusal to charge as requested, was confusing, and rendered uncertain the question as to whether ‘criminal intent’ was or was not essential in order to constitute the crime.”

PEOPLE v. WIMAN, 148 N. Y. 29, 32, 33.

“During the charge the court charged the jury in respect to the meaning of the word ‘defraud’ as follows: ‘Defraud has been defined as follows: To deprive of right either by obtaining something by deception or artifice, or by taking something wrongfully without the knowledge or consent of the owner, and I think that is as good a definition of defraud as I know of.’

“It will be at once seen that this definition is fatally defective so far as it relates to criminal proceedings, as the last branch of the proposition takes no cognizance whatever of the question of intent. The jury were by this definition in effect charged that if Wiman wrongfully took without the knowl-

edge or consent of Dun the money in question, although he may have believed that he had the right to take the money, he was guilty of the intent to defraud required by the statute, thus, as has been intimated, eliminating the one element which it has been repeatedly held must be present, namely, the criminal intent.

“It is undoubtedly true that in order to constitute a crime, the doing of the act prohibited with the intent to do the act is sufficient, although the party may not be aware of the fact that he is transgressing the law. *But there is no possibility of an act of fraud being committed without a fraudulent intent.* **THE WORD ‘FRAUD’ IMPORTS GUILTY KNOWLEDGE.** A man supposing that he has a right to property and taking it without the knowledge or consent of the owner, would, under this definition, be held to be defrauding the owner if it should subsequently turn out that his supposed right was without foundation. In order that there should be no mistake upon this point, the court subsequent to the giving of this definition expressly charged the jury that the question for them to determine was: ‘Did he write the name of Bullinger on the back of that check with intent to get this money from the firm that he had no right to take and apply it to his own purposes?’ No question of criminal intent was submitted, the only question of intent submitted being an intent to do an act which was not by any means of necessity criminal. Even if Wiman believed he had the right

to take this money because of the course of previous dealings, the jury were instructed that if he took it intending to take it, he was guilty of an intent to defraud. An intent to defraud would seem to involve some moral turpitude, but under this instruction a mistake as to property rights is, of itself, sufficient to justify a finding of fraud. This is carrying the definition of 'fraud' much further than has yet been done. We think that in thus instructing the jury the question of criminal intent was entirely eliminated, and under these circumstances the refusal of the request to charge was error."

PEOPLE v. WIMAN, 92 Sup. Ct. 320, 330, 331, 332.

Under the facts as disclosed by the record, and under the law as clearly laid down by the decisions cited, there can be no doubt that the United States failed to adduce facts sufficient to sustain a conviction. In addition to the positive evidence in his favor, the defendant was and is entitled to have his acts considered upon the hypothesis that he was innocent, and to have the presumption of innocence abide by and follow him throughout the case until it was removed by proof beyond a reasonable doubt.

Such being the case it was the duty of the trial court to direct the jury to find the defendant Gernert not guilty. It was error for the court to fail so to do.

“To establish the connection of any one of the defendants with the conspiracy, such connection must be shown by facts and circumstances, or by his own acts, conduct or declarations, independent of the declarations of others, and, until this fact is thus established, he is not bound by the declarations or statements of others. * * *.

“I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to the guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.”

U. S. v. RICHARDS, et al., 149 Fed. 433 (452, 454.)

“There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and

evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt. it is the duty of the appellate court to reverse a judgment of conviction. *Vernon v. United States*, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550; *United States v. Richards* (D. C.) 149 Fed. 443, 454; *Hayes v. U. S.* (C. C. A.) 169 Fed. 101, 103; *United States v. Hart* (D. C.) 78 Fed. 868; 873, affirmed in *Hart v. United States*, 84 Fed. 826, 827, 828; *United States v. Martin*, 26 Fed. Cas. 1183 (No. 15,731); *People v. Ward*, 105 Cal. 335, 341, 38 Pac. 945; *People v. Murray*, 41 Cal. 66, 67; *State v. Hunter*, 50 Kas. 302, 32 Pac. 37; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, 366."

UNION PAC. COAL CO. v. U. S., 173 Fed. 737, 740.

"In a criminal cause, where the evidence for the government, if assumed to be true in fact, together with all reasonable inferences from it, is not legally sufficient to support a verdict of guilty, it is the duty of the trial court, upon being moved thereto, to direct a verdict of not guilty. *Crumpton v. United States*, 138 U. S. 361, 363, 11 Sup. Ct.

355, 34 L. Ed. 958; *France v. U. S.*, 164 U. S. 676, 681, 17 Sup. Ct. 219, 41 L. Ed. 595. In the record in this case we find no evidence that the bottle in question was refilled by the defendant, or by his procurement, or by any one acting for him. The learned court below was therefore in error in refusing the instruction asked for. The judgment must, therefore, be reversed, and the case remanded for a new trial."

DUFF *v.* UNITED STATES, 185 Fed. 101,
102.

IN CONCLUSION.

At the outset of this brief we informed Your Honors that not only was there prejudicial, reversible error in the proceedings in the court below, but that the defendant had been unjustly accused and wrongfully convicted.

His interests and his liberties were overwhelmed by the mass of evidence of the misdeeds of others. He asked for a separate trial, it was opposed by the Government, and the Court declined to grant it. That he was entitled to a separate trial we believe all fair-minded persons will now agree. There could and would be no conviction of the defendant in a case which depended upon proof of what he himself did, and it was only when the mind of the jury became inflamed with resentment over the fraud practiced by the managing officers of the corporation, over their concealment of discouraging facts, over their misrepresentations of existing conditions, and over their cool disregard of the interests of their investors, that they became enraged with every one who had any connection with the company, no matter in what humble and minor degree.

They forgot, just as the United States Attorney has forgotten, that the defendant Gernert was as much deceived by the false and specious claims of the President and Sales Manager of the corporation as were the investing public, and that the revelation of the hidden chapters of the history of the United States Cashier Company were as astounding to him as it was to the jury.

The United States Attorney proved his case by proving everyone of the allegations of his indictment against the defendant Frank Menefee, Oscar A. Campbell, Bonnewell, Todd and LeMonn, but he totally failed as to O. E. Gernert.

The Government may well contend in their cases that notwithstanding error on the part of the trial court, yet the overwhelming mass of testimony demonstrates that those defendants were in truth and in fact conspirators, that they knew that the article they were selling to the public was a glittering sham, that there were no patents, that there was no market, that the company was on the rocks of insolvency, and that those who blinded by their promises invested their money would lose every penny of it. That therefore those defendants shall not be heard to claim a technical error on the part of the Court, and that they shall not go unwhipped of justice.

The charges which were true as to his co-defendants are false so far as he is concerned. The errors of the court which we complain went directly and vitally to his particular case, and without question contributed materially to the judgment of conviction which was entered against him.

We are aware that where conflicting deductions may fairly be drawn from the same facts that appellate courts will not undertake to reverse convictions, but in this case the only fair inference from the evidence is that the defendant Gernert was not guilty.

The appellant is a young man, practically all of his life lies ahead of him, and he has impoverished himself to submit his case to Your Honors sustained by the knowledge that he has been wrongfully accused, and firm in the belief that justice will be meted out to him in this Court, and that the judgment of the Court below will be reversed.

Respectfully submitted,

ROBERT F. MAGUIRE and
E. V. LITTLEFIELD,

Attorneys for the Appellant, O. E. Gernert.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

O. E. GERNERT,

Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**BRIEF OF DEFENDANT
IN ERROR**

Upon Writ of Error to the District Court of the United
States for the District of Oregon.

Clarence L. Reames, United States Attorney for Ore-
gon, and John J. Beckman, Assistant United States
Attorney, both of Portland, Oregon, Attorneys for
Defendant in Error.

Littlefield & Maguire, of Portland, Oregon, Attorneys
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STATEMENT OF THE CASE.

The plaintiff in error was the assistant sales manager of the United States Cashier Company; he was jointly indicted with Frank Menefee, the president; F. M. LeMonn, the sales manager; B. F. Bonnewell, fiscal agent; H. M. Todd, a sales agent; Oscar A. Campbell, the vice president; Joseph E. Hunter, a sales agent; Otto L. Hopson, a sales agent; P. E. Muraine, a sales agent, and Thomas Bilyeu, a director, all being charged with having entered into a conspiracy to violate section 215 of the penal code by selling the corporate stock of the United States Cashier Company under false and fraudulent representations, with the intent in each of said conspirators to defraud the public.

The defendants Hunter, Muraine and Hopson were not on trial; at the conclusion of all of the testimony the court directed a verdict of not guilty in favor of the defendant Bilyeu; the defendants Menefee, LeMonn, Campbell, Bonnewell, Todd and Gernert were convicted. LeMonn accepted the judgment of the court as final.

Menefee, Campbell, Bonnewell and Todd pled out a

writ of error and their case was heard before this court on May 8, 1916.

The plaintiff in error, O. E. Gernert, has separately sued out a writ of error and presents to this court several of the same assignments of error heretofore presented by Menefee, Todd, Campbell and Bonnewell. Those assignments of error presented by Gernert and not presented by Menefee, Bonnewell, Todd and Campbell are directed against the action of the court in admitting in evidence a letter written by Menefee to Gernert; in admitting in evidence certain overt acts; in denying a request to instruct the jury to return a verdict of not guilty; in denying certain other requested instructions, and in the giving of others.

ARGUMENT.

There are thirty assignments of error.

As these are readily classified into nine groups we will so consider them.

1. ASSIGNMENT OF ERROR NO. 1 is directed against the action of the court in admitting in evidence against the defendant Government's Exhibit No. 293, being a carbon copy of a letter dated at Portland, Oregon, February 10, 1912, addressed to O. E. Gernert, at Portland, Oregon. No mention of this assignment has been made in appellant's brief, and counsel may not rely strongly upon it, but we think it ad-

visible to show the court wherein the exhibit was properly admitted.

It appears from the bill of exceptions (Transcript of Record, pp. 104-146) that evidence had been offered tending to prove that Menefee, LeMonn, Bonnewell, Todd and Campbell were all officers of the United States Cashier Company and had entered into a conspiracy on or about September 1, 1910, to violate section 215 of the criminal code of the United States by using the mails of the United States in furtherance of a scheme to promote fraud in the sale of the capital stock of the United States Cashier Company; that the defendant Gernert was the assistant sales manager of the company from January 1, 1911, until January 1, 1912, (Transcript of Record, p. 106); that on May 16, 1912, the president of the company, Menefee, had written the defendant Gernert a letter detailing certain work which Gernert was to perform (Government's Exhibit No. 66, Transcript of Record, p. 107); that it was the custom of Menefee, as president, and LeMonn, as sales manager, to frequently correspond by letter with the defendant Gernert, is shown by the many letters set out in the bill of exceptions passing between these three men. As to the manner in which the letter in question came into the possession of the government, and as proof of its genuineness, we quote from pages 189 and 190 of the transcript of record:

“By the stenographers who were in the employ of the United States Cashier Company during the time that all of the letters and telegrams mentioned in this bill of exceptions were written and sent, it was proven that it was the habit and custom of the officers of the United States Cashier Company, particularly of the defendants LeMonn and Menefee, to handle the matter of the correspondence in the following manner: A letter would be dictated to the stenographer, who would write the same, whereupon the original would be signed by the writer of the letter and the same would then be deposited in the mail for mailing and delivery, as a part of the custom of the office. The stenographer would then upon the lower left-hand corner of the letter or other instrument in writing, place the initials of the author of the letter, together with the initials of the stenographer who wrote the letter. A carbon copy, which would be an exact copy of the letter without the signature would then be placed in the files of the company as a part of its records. Telegrams were prepared in the same way with the exception that attached to telegrams of which there were to be a number of the same telegram to be transmitted to the several agents there would be a letter to the telegraph company authorizing and directing said company to trans-

mit said telegrams and to charge the same to the account of the United States Cashier Company. Mr. House, expert accountant for the Department of Justice, testified that the defendant Menefee had voluntarily delivered to him before the indictment all of these letters and telegrams and that the witness House had thereupon written upon each of these letters and telegrams his initials so as to be able to identify them. House further testified that at the time the defendant Menefee turned these letters and telegrams over to him, that Menefee then voluntarily told him that these letters and telegrams constituted and were the correspondence of the United States Cashier Company. There was no proof offered by either side which would prove or tend to prove that any of the said letters or telegrams were not genuine."

When the letter in question was offered in evidence the following proceedings occurred: (Transcript of Record, pp. 196, 197.)

"Thereupon the Government called to the witness stand Myrtle Meadows, who testified among other things that she was a stenographer in the employ of the United States Cashier Company during the latter part of the year 1911 and the early part of 1912, and the witness testified

as to her employers customs in handling their office work as is shown on pages 58 and 59 of this bill of exceptions.

Whereupon the following proceedings were had:

MR. REAMES: I am going to ask you to examine the carbon copy of the letter of date February 10, 1912, and after you have examined it carefully tell the jury if you know who dictated the letter and to whom it was dictated.

A. I believe it was dictated by Frank Menefee and written by myself.

MR. REAMES: The Government will offer in evidence the letter identified by the witness and dated February 10, 1912, marked Government's Exhibit 293.

MR. MAGUIRE: The defendant Gernert objects to this because there is no proof showing he received it or accepted it, or proof that it was a contract entered into. I may state for the information of the District Attorney that this was not entered into and for that reason he objects to it.

MR. REAMES: I do not know if the court feels whether or not this contract was ever entered into. I do know that the proof shows that

under the admission that the carbon copy came from the files of the company and it has been testified to by the witness that she believes it was dictated to her by Mr. Menefee and in the regular course of business the original would have been mailed.

THE COURT: It will be admitted subject to the explanation of the defendant."

The letter is set out in full in the transcript of record at pages 198 to 201, inclusive, and to the action of the court in admitting the letter in evidence, the defendant Gernert asked and was allowed an exception. Attention is directed to the large list of other letters and telegrams passing between Menefee, LeMonn and Gernert set out at pages 260 and 261 of the transcript of record. We fail to find any merit in the objection against the introduction of this letter (Government's Exhibit No. 293); the letter came from the files of the United States Cashier Company accompanied by a voluntary statement made by the defendant Menefee, the president of the company, that it was a part of the correspondence of said company. The stenographer testified that in her opinion it was dictated by Frank Menefee, and that she wrote it; it bears the initials of the president of the company and of the stenographer. There was no evidence offered showing that it was not genuine; there is not even an intimation or an inference

in the record that it was not genuine. As is shown by the instructions of the court, the defendant Gernert did not take the witness stand, therefore he did not in any way deny that the letter was genuine. Inasmuch as the original of the letter, if it had been mailed, would be in the possession of the defendant Gernert to whom it was directed, the government could not produce the said original and it would have been improper for the government, before the jury, to have asked the defendant Gernert to produce it.

The letter shows on its face that there had been before that time an understanding or some sort of tentative arrangement between Menefee and Gernert as to how private stock would be disposed of. The other evidence in the case, which will hereinafter be reviewed in connection with the objection of Gernert that there was no evidence to connect him with the conspiracy, shows that Gernert for some time before the writing of this letter in question had been engaged in the sale of the personal stock of Menefee, LeMonn and himself upon representations that he was selling the treasury stock of the company. Whether or not there was actual proof that Gernert formally accepted the terms of the letter in question, in view of all the other evidence in the case and the contents of the letter itself showing a previous understanding between the writer and the addressee, and in view of the admission of record on the part of the defendants, and the testimony of Miss Meadows, this

letter is made competent as a circumstance to show Gernert's connection with the conspiracy. The admission of this copy of the original letter, as was done in this case, has been held not to be error.

Trent vs. United States, 228 Fed. 648, 650, 651.

McKnight vs. United States, 122 Fed. 926, 929.

United States vs. Greene, 146 Fed. 784, 787, 789.

2. ASSIGNMENTS OF ERROR NO. II AND

II-A are directed against the action of the court in admitting the Ovaitt testimony.

These same assignments of error were presented to the court in the same case at the hearing before this court in the case of Menefee, Bonnewell, Todd and Campbell, vs. the United States, which case was heard by this court on May 8, 1916.

True, the assignments of error in the case at bar are presented in a slightly different manner but in the main the same questions are raised.

In our printed brief filed in the Menefee case (a copy of which has been served upon counsel for plaintiff in error herein) at pages 47 to 80 thereof, we fully stated our position in regard to these assignments of error, both as to the law and the fact and no good purpose could be served by reprinting that argument at this time.

We might add, however, that in the event this court, after a consideration of what we have to say hereafter in

reference to those assignments of error dealing with the sufficiency of the evidence, is of the opinion that Gernert was a member of the conspiracy, then it would necessarily follow that the Ovaitt testimony, if admissible at all would also be admissible as against him.

3. ASSIGNMENT OF ERROR NO. III is directed against the action of the court in admitting the proof of the overt acts, the proceedings in this connection being fully set out at page 128 of the transcript of record as follows:

“And the plaintiff offered evidence tending to prove that in pursuance of the said conspiracy and to effect the object thereof, the defendants B. F. Bonnewell, Frank Menefee, and F. M. LeMonn committed each, every and all of the overt acts that are mentioned, specified and stated in the indictment in the manner and at the several times and places respectively alleged and stated in said indictment.”

And at pages 261 to 268 of the transcript of record, at which last mentioned pages of the record, it is shown that the several overt acts were offered in evidence.

We preface our argument upon this assignment with the assumption that this court will be of the conclusion and will hold that Gernert was a member of the conspiracy.

As shown by the record hereinbefore cited at the time evidence of the overt acts was offered, counsel for Gernert asked the United States Attorney whether he elected to prosecute for a violation of section 37 of the penal code or a violation of section 215 of the penal code; to which the United States Attorney replied that the indictment was for a violation of section 37; the United States Attorney then responded in the affirmative to a second question propounded by counsel for Gernert to the effect that the various overt acts set out in the indictment were the overt acts referring to and in pursuance of the particular conspiracy set out in the indictment. To a third question propounded to the United States Attorney by counsel for Gernert the United States Attorney responded that it was his contention that these letters were written and mailed in the United States mail and that the government claimed it to be proven by circumstantial evidence that these letters and various exhibits, being exhibits numbered 120 to 272, inclusive, (Trans. of Record, p. 263) had been mailed in the United States mail in the ordinary course of business and related and referred to the particular conspiracy set out in the indictment, and that the United States Attorney thought they were in execution of that particular conspiracy.

As we understand the position of counsel for the plaintiff in error, there is no contention but what the

letters were sufficiently identified and that competent proof was offered tending to show that said overt acts and each, every and all thereof were mailed by the respective conspirators in pursuance of the conspiracy and at the several times and places designated in the indictment.

We also understand that counsel for plaintiff in error contends that by the statement of the United States Attorney herein above referred to that the United States Attorney thus took the position in open court that more than three years prior to the date of the indictment two of the conspirators had, in execution of the scheme to defraud, as it is charged in the indictment, mailed certain letters, from which admission and statement it is the position of counsel for plaintiff in error that the United States Attorney has admitted such a state of facts as will conclusively show that the alleged scheme to defraud was fully executed prior to February 27, 1912, and thus, being completed, is barred by the statute of limitations.

We might suggest in beginning the discussion of this phase of the case that while the questions propounded to the United States Attorney were manifestly ingeniously worded so as to entrap him into making an admission which counsel for the appellant believed would be fatal to his case, that the record hereinabove quoted does not

go to the extent claimed for it by counsel for plaintiff in error.

But for the purpose of the argument, assuming that the United States Attorney did admit in open court that certain letters in execution of the scheme to defraud alleged in the indictment were mailed by the several conspirators prior to February 27, 1912, still, it is our contention that this admission would not establish the fact either that the crime had been fully consummated prior to February 27, 1912, or that the action was in any way barred by the statute of limitations.

The indictment alleged (Transcript of Record, p. 28) and the proof showed (Transcript of Record, p. 125) that the conspiracy was to be a continuing conspiracy and that it was to and did continue at all times between September 1, 1910, until and including January 1, 1915, and that at and during all of the said times and dates the conspirators would and did continue to be parties to said conspiracy and would and did continue to commit the said acts and crimes hereinbefore set forth in detail.

The charge and the proof thus showing a continuing conspiracy we contend that the crime would not be barred because a letter was mailed either in execution or furtherance of the scheme to defraud or in pursuance of the conspiracy prior to February 27, 1912.

If the rule of law should be different, then it would

be possible for men to enter into a gigantic conspiracy to defraud the public by use of the mails of the United States, reduce their illegal and fraudulent conspiracy agreement to writing, sign and execute the same before witnesses so that the date of the conspiracy would be fixed, thereafter and on the same day cause a letter to be mailed in execution of the scheme to defraud which they had conspired to devise and execute, sit down calmly and wait three years from the date of the mailing of said letter and then proceed to swindle, fleece and defraud the public out of millions of dollars in accordance with the terms of their original fraudulent conspiracy contract, and then when confronted with indictment and proof charging a continuing conspiracy absolutely escape all punishment and claim absolute immunity from further prosecution by showing that the scheme to defraud which they had so conspired together to devise and execute was barred by the statute of limitations, because, forsooth, a letter mailed in execution of the scheme had been mailed prior to the expiration of three years from the date of the filing of the indictment.

The burden of the contention of counsel for Gernert in argument of this assignment of error is that, inasmuch as the defendants are charged with having conspired to violate section 215 of the Penal Code, the offense charged was consummated the very instant that a letter was placed in or taken out of the mails in furtherance of the conspiracy, and that while it may be true

that a conspiracy to defraud the government could be a continuing conspiracy, yet, by the very nature of the crime, a conspiracy to use the mails to defraud could not be continuous, because the mailing of a single letter would complete the object of the conspiracy. Counsel fails to distinguish between a conspiracy to commit the acts made offenses by section 215 and the violation of that section itself. The gist of section 215 is the mailing of a letter in execution of a fraudulent scheme. The mailing of each letter would constitute a separate offense. In the prosecution for violation of section 37 Penal Code the unlawful agreement or conspiracy itself is of prime importance and really the offense made punishable by the statute, the overt acts only being necessary to make the unlawful agreement a crime and to afford jurisdiction.

Hyde vs. U. S., 225 U. S. 347.

A conspiracy is a partnership in criminal purposes, and as such may have continuation in time.

U. S. vs. Kissel, 218 U. S. 601, 608.

As stated above, the indictment charges that the conspiracy on the part of defendants, to commit acts made offenses by the laws of the United States, was to, and did, continue from 1910 to 1915. There was only one conspiracy alleged in the indictment, and it was proven to have continued for the length of time alleged. An overt act, consisting of the mailing of a letter, while it

may have completed the violation of section 215 Penal Code, did not necessarily effect the object of the conspiracy, or rather complete and terminate it, because it was alleged and proved that this conspiracy was to, and did, continue from 1910 to 1915. Counsel for plaintiff in error draws the conclusion that if the mailing of a single letter is a separate and distinct offense against section 215, that an agreement to commit such an offense is a violation of section 37 Penal Code, and that the defendants could be prosecuted for an offense for each time they mailed or received a letter, and that a count for conspiracy could lie upon each letter so sent or received. In other words, counsel claims that the indictment is duplicitous because 16 overt acts are alleged in one count. Counsel's contentions in this behalf are not supported by the authorities.

Stanley vs. U. S., 195 Fed. 896 (C. C. A. 8th Cir.)

In this case the defendants were indicted for conspiring to violate section 5480 R. S., that is, with conspiring to defraud by use of the mails. It was there contended that the conspiracy was a completed offense when the first overt act in pursuance of the conspiracy was committed, and, as more than one overt act was alleged, several offenses were charged. The court in this connection said:

"The crime consists in the conspiracy to commit the offense. The overt act is no part of the

offense of conspiracy, as was said in *Ware vs. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233;

‘The offense under section 5440 is the conspiracy, not the conspiracy and the overt act.’

Or, as said in *United States vs. Britton*, 108 U. S. 199-204, 2 Sup. Ct. 531, 534 (27 L. Ed. 698);

‘This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a *locus penitentiae*, so that before the act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.’

The conspiracy is a continuing one so long as overt acts are committed in furtherance thereof. *United States vs. Kissel*, 218 U. S. 601-607, 31 Sup. Ct. 124, 54 L. Ed. 1168. It therefore follows that the charging in a single count of the indictment for conspiracy of more than one separate and distinct overt act is not charging separate and distinct offenses.”

The case of *Brown vs. Elliott*, 225 U. S., 392, 400,

completely establishes the error of appellant's contentions, that the conspiracy here alleged may not have continuity. This was a case where defendants were indicted for conspiring to violate the mail fraud statute. The conspiracy was alleged to be a continuing one, and the court, in passing upon the indictment, held that such a conspiracy might continue in existence and in the process of execution and operation any length of time. The court said:

"If, however, we assume with appellants that the indictment charges that the conspiracy was formed in 1905 and at a place unknown to the grand jurors, the same result must be pronounced, upon the authority of *Hyde vs. The United States*, just decided, ante, p. 347. We there held that the place of trial could be any State and district where an overt act was performed. And we further held, following *United States vs. Kissel*, 218 U. S. 601, that conspiracy might be a continuous crime. We there said, distinguishing a crime from its results: 'But when the plot contemplates bringing to pass a continuing result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies,

rather than to call it a single one.' These remarks are especially pertinent to the case at bar. It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous, and, being so, every overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot."

See also *U. S. vs. Eccles*, 181 Fed. 906;

Breese vs. U. S., 203 Fed. 824, 830;

U. S. vs. Rogers, 226 Fed. 512;

Houston vs. U. S., 217 Fed. 852, 858.

The cases cited by appellant in support of his argument in this connection are not applicable.

In re Henry, 123 U. S. 372

was concerning an indictment for using the mails to defraud.

Francis vs. U. S., 152 Fed. 155

is clearly distinguishable from the case at bar. This was an appeal from a conviction on an indictment for conspiring to use the mails to defraud, but there was no allegation or proof in that case that the conspiracy was a continuous one, as far as the opinion of the court shows.

Each count of the indictment was manifestly drawn on the theory of a separate conspiracy in connection with each overt act. This case does not hold that there

can not be a continuing conspiracy to violate the mail fraud statute. Even if it did, it would be in contravention of the ruling of the Supreme Court in the case of *Brown vs. Elliott*, *supra*.

The legal proposition quoted by counsel from *U. S. vs. Ehrgott*, 182 Fed. 267, 273 is correct as far as it goes, but this case has no application to the facts in the case at bar.

Lonabaugh vs. U. S., 179 Fed. 476.

This case also concerned a conspiracy to violate the mail fraud statute, but there was no allegation or proof there of a continuing conspiracy, as far as a reading of the opinion shows.

U. S. vs. Burke, 218 Fed. 83.

A further reading of this case at page 84 supports our views of the law.

Ex parte Black, 147 Fed. 832.

This was a *nisi prius* case, and has been held not to be according to the weight of authority. See *Breese vs. U. S.*, 203 Fed. 824, 830.

4. ASSIGNMENT OF ERROR NO. IV is directed against the action of the court in refusing to instruct the jury to return a verdict of not guilty, for the reason that the indictment does not state facts sufficient to constitute a crime.

In our opinion the indictment charges every element of the offense, and at this time we have no suggestion from counsel for the appellants as to what argument, if any, is to be advanced to support this assignment. There was no demurrer filed to the indictment and the question first arose upon the motion for a directed verdict.

5. ASSIGNMENT OF ERROR NO. V is directed against the action of the court in denying the motion of the defendant Gernert to direct a verdict of not guilty for the reason that the indictment charges more than one crime. This objection was made for the first time formally upon the motion for a directed verdict. This assignment is probably directed to the plurality of overt acts in one count. We have touched upon this question in our argument herein under assignment No. III. There is no merit in this contention.

See

Stanley vs. U. S., 195 Fed., 896;

U. S. vs. Eccles, 181 Fed. 906.

6. ASSIGNMENTS OF ERROR NO. VI AND VII present for consideration what we consider the only question involved, viz., whether or not the evidence was sufficient to sustain the verdict.

There was evidence tending to prove each, every and all of the following facts:

(i) The United States Cashier Company was a

corporation with its place of business in Portland, Oregon. (Transcript of Record, pp. 105, 106).

(ii) During practically all of the times mentioned in the indictment Menefee was a director, the president, and general manager of said corporation; during said periods LeMonn was the sales manager; from January 1, 1911, until January 1, 1912, Gernert was an agent and salesman of the company (Transcript of Record pp. 106, 107); and while there was testimony to the effect that Gernert was not assistant sales manager after December 31, 1911. (Transcript of Record, p. 106.) Government's Exhibit No. 66 (Transcript of Record, p. 107) clearly proves that Gernert was working in the capacity of salesman as late as May 16, 1912. President Menefee testified (Transcript of Record, p. 274) that Gernert did not do any work *particularly* for the company after January 1, 1912; that during practically all of the times mentioned in the indictment Bonnewell was the fiscal agent and an agent and salesman for the corporation, and that during said times Todd, Hunter, Hopson and Muraine were sales agents of said corporation (Transcript of Record, p. 113); that during said times Campbell was a director, and the vice president of said corporation, and that between June 9, 1913, and January 31, 1914, Bilyeu was a director of the corporation; (Transcript of Record, pp. 113, 114.)

(iii) That the capital stock amounted to the sum

of \$1,200,000, segregated into 120,000 shares of the par value of \$10.00 each;

(iv) That at Portland, Oregon, and on or about September 1, 1910, Menefee, LeMonn, Bonnewell, Todd and Campbell conspired together to violate section 215 of the penal code by fraudulently, and by false representations to sell the capital stock of said corporation, to be effected by means of the postoffice establishment of the United States. (Transcript of Record, pp. 114, 115.)

(v) That it was a part of the conspiracy that more than \$1,000,000 was to be collected from the public on account of said false representations and the public was to be defrauded out of all of said money. (Transcript of Record, pp. 115, 116).

(vi) It was a part of the conspiracy that false representations were to be made relative to the ownership of certain patents (Transcript of Record, pp. 116, 117).

(vii) It was a part of the conspiracy to falsely represent, that the corporation was the owner of bona fide orders for the purchase of machines; that the financial condition of the corporation was excellent and the assets exceeded the liabilities; that stock offered for sale was the property of the corporation and that the money derived from the sale was to be by said corporation invested so as to increase the assets of said corporation; that on account of the said splendid financial condition

of the corporation it was justifiable to periodically raise the selling price of the stock from \$10.00 per share to \$50.00 per share. ¹(Transcript of Record, p. 118) ; that in truth and in fact each, every and all of said representations, as the said conspirators well knew, were false, untrue and fraudulent (Transcript of Record, pp. 119-122).

(viii) That it was a further part of the conspiracy that false and untrue written and printed statements of the assets and liabilities of the corporation were to be published; that the scheme and artifice to defraud was to be carried out in many states in the Union (Transcript of Record, pp. 122, 123).

(ix) That the conspiracy should, would and did continue from September 1, 1910, until January 1, 1915, (Transcript of Record, p. 125). It was also proven that it was the custom of Menefee, acting as president, and LeMonn, acting as sales manager, to send letters and telegrams to agents of the company advising said agents the price of the stock was about to be raised; all this for the purpose of hurrying prospective purchasers into making a purchase of the stock (Transcript of Record, p. 126) ; that it was a habitual custom of said Menefee, LeMonn and said agents in the field to follow this practice in inducing purchasers to invest (Transcript of Record, p. 126) ; that frequently the agents would request that these boosting letters be sent them, and Men-

efee and LeMonn would comply with this request as a matter of custom (Transcript of Record, pp. 126, 127) ; that Menefee and LeMonn caused to be created a board of advisers for the purpose of deceiving the public (Transcript of Record, p. 127) ; that these members of the so-called advisory board received special contracts fraudulently promising earlier dividends than the other holders of the stock would receive (Transcript of Record, p. 127) ; that Gernert took no part in the sending of said letters or telegrams or the creation of the advisory board or the issuance of the preference contracts and had no knowledge of any of said things other than shown in the bill of exceptions (Transcript of Record, p. 128).

(x) That each, every and all of the overt acts alleged in the indictment were committed at the several times and places alleged and stated in the indictment and in pursuance of the conspiracy and to effect the object thereof (Transcript of Record, p. 128).

(xi) There was evidence tending to prove that in three papers, each having a circulation of more than 25,000 subscribers, served by the agency of the mail, Menefee and LeMonn inserted advertisements of the United States Cashier Company displaying the names of LeMonn, Menefee, Campbell, Bonnewell, Todd, Bilyeu, and Gernert, as officers of the corporation (Transcript of Record, pp. 128, 129). These advertisements

are set out and displayed in the transcript of record at pages 129 to 142, inclusive.

(xii) There was testimony tending to prove that the company received on account of the sales of its capital stock, in cash, \$760,165.00 and disbursed over \$400,000 to its agents as commission upon the sale of its said capital stock; that LeMonn received ten per cent commission; Menefee received ten per cent commission; that the agent making the sale received thirty per cent commission; making in all a total commission upon each sale of capital stock of fifty per cent; (Transcript of Record, p. 145); that approximately \$1,500,000 in cash and property were paid to the United States Cashier Company during the continuance of the conspiracy on account of said sales of said capital stock (Transcript of Record, p. 146); that nothing of value was returned to the public in exchange for said money and property and that Menefee, LeMonn, Campbell, Bonnewell and Todd received large sums of money and made large profits by selling and disposing of their own personal stock (Transcript of Record, pp. 145, 146).

It is certified in the bill of exceptions '(Transcript of Record, pp. 146, 147, 148) that there was no testimony received at the trial which tended to prove that Gernert had any knowledge or information of the swindle other than is set out in the bill of exceptions; we now pass to a consideration of that evidence which directly involves the defendant Gernert.

(1) It appears from the twelve propositions of fact stated above that there was a conspiracy existing between Menefee, LeMonn, Bonnewell, Todd and Campbell, which continued from September 1, 1910, until January 1, 1915; it is fairly inferable from the said propositions of fact that this conspiracy was proven by evidence consisting of oral testimony, written letters and telegrams which actually proved that the said conspirators had performed the things which they conspired to do; it is fairly inferable from said above twelve propositions of fact that this was a conspiracy of such magnitude and such duration that Gernert could hardly have acted as assistant sales manager of the company without knowledge of the fraud; it is fairly inferable from the above twelve propositions of fact that Gernert acted as assistant sales manager until April 1, 1912.

(2) It was shown by the testimony of Mr. Menefee (Transcript of Record, pp. 273, 274) that Gernert was with the company before Menefee became manager; that Gernert knew about the selling and the field work pretty well; that he was the man depended on for the field work and in training other salesmen, but that he was assistant sales manager purely in the field and in outside ways and had nothing to do with the inside work or the office.

(3) There was evidence tending to prove that each, every and all of the advertisements containing the false advertising matter set out and detailed at pages 129 to 142, inclusive, of the Transcript of Record, bore the

name of O. E. Gernert as one of the officers of the United States Cashier Company.

(4) It was proven by the testimony of C. B. Clark (Transcript of Record, pp. 149-163) that Gernert represented himself as assistant sales manager of the United States Cashier Company; that Gernert sold Clark a third interest in one thousand shares of stock at the price of \$25.00 per share under representations that the money was to be paid into the treasury of the company, and that the witness and Gernert and another were to receive a machine agency in consideration of said purchase; that Gernert wrote the witness the letter marked as Government's exhibit No. 242; that Menefee subsequently told the witness that the stock he had purchased was Mr. Gernert's private stock, for which reason the witness could not get the agency; that in completing the transaction the witness had given Gernert a \$2500.00 mortgage upon his property which still remains a lien thereon.

(5) It was proven that the stock obtained by the witness Clark was transferred from a certificate which stood in the name of Frank Menefee, Trustee, (Transcript of Record, p. 165); and that no part or portion of this sum of \$2500.00 ever went into the treasury of the company (Transcript of Record, p. 166).

(6) By Government's exhibit No. 290, being a letter of date December 5, 1911, written to Gernert by Menefee (Transcript of Record, pp. 166, 167) Gernert

is advised that in eleven instances in which he has sold stock that the stock is the privately owned stock of Menefee, and that when settlement is made Menefee and Gernert are to get together and divide.

(7) By Government's exhibit No. 292, being a letter of date December 9, 1911, written by Menefee to Gernert (Transcript of Record, p. 168) Gernert is advised that the witness Clark has received the personal stock of Menefee; the contract between Menefee and Gernert is explained and the further statement is made that Agent Muraine had been given to understand that none of the stock of Mr. Gernert is to be put in on the deal and that as to this feature Agent Muraine has been purposely misled.

(8) In Government's exhibit No. 291, being a letter written by Gernert to Menefee of date December 14, 1911 (Trans. of Rec., p. 170), upon letterhead bearing the name of Gernert as assistant sales manager, receipt is acknowledged of two letters written by Menefee of date December 5, and December 9, 1911; a close interest and association in the business are shown and a detailed report of all business done is promised; the statement is made that Gernert expects to see his \$75.00 as salary credited each week notwithstanding the fact that it appears that Gernert was then absent on a private stock deal between himself and Menefee; the letter evinces surprise that Agent Muraine should know of the private stock deal.

(9) Government's exhibit No. 288 (Transcript of Record, p. 173) is a letter written by Gernert to defendant LeMonn of date February 27, 1912. We quote it verbatim:

“THE STOCKTON

Stockton, Cal., 2/24

My Dear LeMonn:

I have yours of the 27th. As to this country give me two inches of rain and I'll come home with forty feet of gold. What is Amsden doing in Sacramento, he is hiring men posing as fiscal ag't. A fellow by the name of Nathan was in Lodi last week with a street car machine. Some one was in Stockton this week. I am working Tracy, wired you today asking for list of stockholders & especially Cal. & S. Francisco holders.

I believe I will do business with the Tracy bank, directors et all. I told them I had 35000 to sell & if I sold it all in their community the Co would permit one man to seat on the advisory board & see that everything is taken up legitimately. They are to have another special meeting at which my presence will be required at which time I must have stockholders list and statement. Show up cash & notes in one item.

Write me a personal letter and tell me you will do all in your power to help me get that 1000

machines I ask for, for my territory. Also say in a joking way that you never knew there were so many banks in the country, as the letters show which are coming in daily asking about machines. Also state that one of the directors stated at luncheon the other day that they are figuring to keep the wheels running 24 hrs a day 3-8 hr shifts in order to supply the great demand which I know there is for our new born toy.

Also state that the other *two* agencies are almost through with the stock selling & if I want to let them have what I got to sell to let you know as they want it, but personally you wouldn't do it as it would mean that I would have to lay *ideal* for a month or two until the machines are ready.

I am feeling fine physically & seem to be sound mentally, its only once in a while I get bugs.

Yours mit lof

Gernert.

P. S. I hocked my sparkler to-day in order to save myself from being knocked down, theres so many holdups these days.

(10) Government's exhibit No. 289 (Transcript of Record, pp. 175, 176) is the answer of LeMonn to the above quoted letter:

“March 2, 1912

Mr. O. E. Gernert,
Stockton, Calif.

My dear Gernert:

I have your favor of the 27th, and have carefully noted contents of same, and beg to advise that Mr. Amsden has reported at this office this afternoon and is not leaving anyone working in California.

We are today sending you a partial list of stockholders in California, as the entire list was eight pages long, together with financial statement as shown by our books February 1, 1912.

We will be only too pleased to have a member on the Advisory Board from that section of California providing they sell \$35,000 worth of stock allotted to you, as then they would have a sufficient investment to take a deep personal interest in advising with us as to plans of manufacturing and selling.

You may count upon me using my personal influence in giving you all the possible support toward providing you with 1000 machines which you have requested for your territory. You would really be surprised at the number of unsolicited orders that are coming in from almost every quarter, and it has been a very agreeable surprise to

the writer, as I had no idea there were that many banks and paymasters in the country.

You may be interested to know that the Board of Directors have decided to have the factory work overtime and we are figuring on getting the factory on three shifts of eight hours each, which means that they will have to work twenty-four hours a day if the orders keep on coming, in order to supply the great demand, which we are assured for this new device, our Automatic Cashier.

Just a word to advise you that the other two fiscal agents have almost sold their entire allotment and want to know if we can supply them with another block which means, if we are to do this, that we get some from you and want you to advise us by return mail if you are willing to release any part of your block and turn it over to them. In fact, I think they would give you a small premium if you would do so. Just bear in mind that we are not asking you to do this as it would mean that you and your men would have to remain idle for at least thirty or sixty days until we could supply you with enough machines to keep your men busy.

It may interest you to know that a week ago I saw the first Standard Commercial Automatic Cashier demonstrated and in action and watched

it work for a period of thirty minutes without it making a symbol of an error, and I believe that this demonstration proved one fact: That it is the first time in the history of the world that any machine ever made three automatic visible records of a transaction, two of which were permanent, one on the endless tape and the other on the check itself and these, together with the visible total which is always before you, constituted these three records. Besides these three records, we had two others, one when the keys were depressed, and as you know remain down until the machine is operated, and the other the money which was paid from the machine automatically.

We have been very enthusiastic after this demonstration and are absolutely satisfied that these machines will revolutionize the present systems of handling money and prove to be one of the greatest of modern inventions.

Am glad to know that you are feeling yourself again and wishing you continued success, beg to remain,

Yours very truly,

FML:E

SALES-MANAGER."

These two letters plainly and conclusively show Gernert's connection with the conspiracy and his perfect working understanding with LeMonn, one of the

mainsprings of the conspiracy, in doing just what the indictment alleged the conspirators were to do. Gernert's knowledge of the fraud is here shown too plainly for comment.

(11) Government's exhibit No. 294 is a letter written by LeMonn of date March 2, 1912, to Gernert (Transcript of Record, p. 178) in which the close connection between Gernert and LeMonn is clearly shown.

(12) Government's exhibit No. 295, is a letter written by LeMonn to Gernert of date March 23, 1912, (Transcript of Record, p. 180) in which the connection between LeMonn and Gernert is so clearly shown as to need no comment whatsoever.

(13) Government's exhibit No. 440 (Transcript of Record, p. 185) is a letter written by LeMonn and Gernert of date March 12, 1912, in which the connection between LeMonn and Gernert seems to us to be demonstrated.

(14) The evidence set out at pages 189 to 196, of the transcript of record, and the many telegrams therein shown, all show a close working connection between LeMonn, Gernert and Menefee, and that boosting telegrams were frequently sent to Gernert which were to be shown by Gernert to the public for the purpose of deceiving the public into the purchase of the shares of stock of the corporation.

(15) Government's exhibit No. 293, being a letter written by Menefee to Gernert of date February 10, 1912, (Transcript of Record, p. 198) explains in detail the contract between LeMonn, Gernert and Menefee.

(16) By the witness Lew Paramore (Transcript of Record, pp. 201-213) it was proven that at Snohomish, Washington, on December 2, 1911, Gernert sold the witness fifty shares of United States Cashier stock at \$20.00 per share, making a total consideration of \$1,000, the witness giving to Gernert his promissory note for \$1,000 of date December 2, 1911, due five years after date; that this stock was bought on account of the direct representation made by Gernert to the witness that the stock was treasury stock of the United States Cashier Company; that it was being sold to pay off the indebtedness of the company and that the proceeds were to go into the treasury of the company, and that the Cashier Company owned the patents to its machines; that the Railroad Companies were already using the machines of the Cashier Company and they were going to be put upon the streetcars at a daily rental; that this rental would pay the company \$150,000 per year. The witness further testified that he bought this stock upon these direct representations of Mr. Gernert. It is true that the witness was an old man and that he became slightly confused upon his cross examination. However, the above statements made by the witness bear every evidence of verity. The witness further testified

that Gernert at the time of the sale claimed to be representing the United States Cashier Company as its assistant sales manager. The note given by the witness to Gernert is secured by a mortgage upon the property of the witness, and this mortgage still remains as a lien upon the property.

By the testimony of Mr. House (Transcript of Record, p. 213) it was proven that Mr. Paramore received certificate of stock 2729 of date December 6, 1911, for fifty shares and that this stock was issued from a certificate which stood in the name of Frank Menefee; that the company received no benefit from this transaction; note the statement made in the letter written to Gernert by Menefee (Government's exhibit No. 290, date December 5, 1911, Transcript of Record, p. 166) that the shares of stock were enclosed in this letter to Gernert with the statement that they would be taken care of out of the Menefee personal stock and that subsequently Gernert and Menefee were to get together and divide.

(17) By the testimony of J. W. Zufall (Transcript of Record, p. 214-216) it was proven that on November 18, 1911, witness purchased ten shares of stock from an agent of the company at \$20.00 per share; that he paid \$100 in cash at the time of the purchase; that subsequently he paid \$50.00 more and gave a note for the other \$50.00; this note was made payable to O. E. Gernert and was delivered personally to Mr. Gernert by

the witness; the note was paid at maturity; that Mr. Gernert, at the time, said he was representing the United States Cashier Company. By the testimony of Mr. House (Transcript of Record, pp. 219, 220) it was proven that certificate of stock 2722 issued to J. W. Zufall December 6, 1911, for ten shares, and that this was transferred from a certificate standing in the name of Frank Menefee; that the United States Cashier Company received no benefit from this transaction.

(18) By the testimony of G. H. Moore (Transcript of Record, p. 216) it was proven that in December, 1911, the witness purchased some stock of the United States Cashier Company upon the solicitation of agent Muraine, one of the defendants in this case, and the same man who is mentioned in Government's exhibit No. 290 (Transcript of Record, p. 166), as working with Gernert; the same man who is mentioned in Government's Exhibit No. 299 (Transcript of Record, p. 169) as the agent who was deceived relative to the private stock deal and the same man and agent mentioned in the letter written by Gernert to Menefee of date December 14, 1911, Gov. Ex. 291 (Transcript of Record, p. 170) as not knowing anything of the private stock deal between Menefee and Gernert. It is fairly inferable from the above testimony and exhibits that Gernert and Muraine were working together in the sale of stock; that a private arrangement was in existence between Menefee and Gernert to the effect that their own per-

sonal stock should be sold instead of treasury stock, but that the defendant Muraine who was assisting in the sales was not let in on the secret.

It was further proven by the testimony of this witness that the representations made to him by Muraine were also made to other purchasers at approximately the same time in the hearing of the witness by the defendant Gernert; it was proven by the testimony of Mr. House (Transcript of Record, p. 219) that Mr. Moore, on December 26, 1911, received certificate of stock 2727 which was transferred from a certificate standing in the name of Frank Menefee, the United States Cashier Company receiving no benefit from this transaction.

(20) By the testimony of W. A. Decker (Transcript of Record, pp. 220-224) it was proven that the witness purchased stock in the United States Cashier Company from Agent Muraine; that he bought five shares for \$20.00 a share, and that the representations were that the money was to go into the treasury of the company for the purpose of equipping the factory.

By the testimony of Mr. House it was proven that on December 6, 1911, five shares of stock were issued to W. A. Decker, transferred from a certificate which stood in the name of Frank Menefee, and that no part of this money went into the treasury of the company in payment for the stock.

The witness Decker is the same stockholder whose

stock was forwarded to Gernert by Menefee under representations contained in the letter of date December 5, 1911, being Government's exhibit No. 290 (Transcript of Record, p. 166).

((21) By the testimony of Dr. C. R. Zener (Transcript of Record, pp. 224, 225) it was proven that the witness purchased stock in the United States Cashier Company from agent Muraine; that he purchased twenty-five shares at \$20.00 per share, giving two notes for the stock; that representations were made that the money was to be used for the purpose of financing the building of a factory and installing machines; by Government's exhibit No. 297 it was proven that Menefee, not personally, but as president of the company, officially acknowledged the receipt of \$50.00 to apply upon a note given for the purchase of this stock; by the testimony of Mr. House (Transcript of Record, p. 226) it was proven that on December 6, 1911, certificate of stock No. 2721 was issued to Dr. C. R. Zener for twenty-five shares; that this was transferred from the private stock standing in the name of Frank Menefee; no part or portion of the money that was paid going into the treasury of the company. The witness Zener is evidently the same man mentioned in the letter of date December 5, 1911, written by Menefee to Gernert transmitting twenty-five shares of stock to Gernert upon the account of "C. R. Yener" (Transcript of Record, p. 166).

(21) By the testimony of Mrs. Ollie B. Howard, (Transcript of Record, pp. 228-231) it was proven that in May, 1913, the witness had a conversation with the defendant Gernert in which he said that he had been employed by the United States Cashier Company, had traded his stock for \$100,000 in property and received a large sum in cash; that in order to interest prospective customers they were "wined and dined" and when under the influence of liquor they would be persuaded and induced to purchase stock. This testimony was rather weakened by the affidavit set out at pages 229 and 230 of the Transcript of Record, but the witness testified (Transcript of Record, p. 231), that the affidavit had been prepared by Gernert and that she had signed it without reading it and had been deceived thereby. After all, the question of the credibility of the witness was a question of fact for the jury.

(22) By the testimony of C. F. L. Smith (Transcript of Record, pp. 231 and 232) it was proven that in the latter part of the year 1911 the witness had purchased stock from an agent of the company and had talked about the purchase in the demonstration rooms of the company with Mr. Gernert; that Gernert told him that the stock would raise to \$100.00 per share within a year.

(23) By the testimony of Harry Wainwright (Transcript of Record, pp. 232-238) it was proven that

Gernert had assisted in the sale of stock to the witness upon the representations that dividends would probably be paid by the year 1912; that the company was manufacturing five machines and that the machine was patented in this and other countries.

(24) By the testimony of Elmer C. Townsend (Transcript of Record, p. 239) it was proven that at Vancouver, Washington, in October, 1911, the witness purchased twenty-five shares of stock at \$15.00 per share from agent Muraine; that the witness gave Gernert a mortgage upon real property for the payment of the stock and finally gave Gernert a deed to the realty in payment for the stock; it was proven by the testimony of Mr. House (Transcript of Record, p. 239) that Townsend received twenty-five shares of stock transferred from a certificate which stood in the name of O. E. Gernert, no part of the money that was paid going into the treasury of the company and the company receiving no benefit on account of this transaction.

(25) It was stipulated between the government and the defendant Gernert (Transcript of Record, p. 164) that the books and records of the United States Cashier Company had been correctly kept and that they correctly, accurately and truthfully showed the financial transactions of the United States Cashier Company and that all entries appearing therein are true, correct and accurate records and entries (Transcript of Record, p. 164).

(26) It was proven by the testimony of Mr. House that,

“The records of the company show that on December 30, 1911, a credit was made to Mr. Gernert’s account on the books of the United States Cashier Company for \$375.00, with the notation that it is for salary and expenses for five weeks from November 25, 1911, to December 30, 1911. Said records further show that on January 4, 1912, the company paid Gernert \$83.34 in cash. On January 12, 1912, (\$250.00 in cash. On February 5, 1912, \$25.00 in cash. On February 8, 1912, \$75.00 in cash. On February 10, 1912, \$150.00 in cash. On April 11, 1912, \$100.00 in cash. On May 8, 1912, \$100.00 in cash. On May 25, 1912, \$100.00 in cash. On June 11, 1912, \$50.00 in cash. On July 2, 1912, \$50.00 in cash. Making a total payment in cash of \$983.34, subsequent to December 30, 1911. Mr. Gernert’s account was credited with \$513.60 on account of commissions. This would make a payment to Mr. Gernert of \$469.74 more than his commissions. In compiling these figures I have not taken into consideration any commission that Mr. Gernert might have made from the sale of private stock; the records of the company further show that the company has paid to Mr. Gernert in cash a total of \$8170.56 during the years 1910,

1911 and 1912; that the account was opened about the 1st of April, 1910. In these figures I am not taking into consideration any sums of money or any property that Mr. Gernert may have received on account of the sale of any personal stock either belonging to himself or anybody else, and these figures are exclusive of all amounts that Mr. Gernert may have received as commissions on the sale of private stock. In reference to the statements made in Government's Exhibit No. 295, being a letter from LeMonn to Gernert, the books and records of the United States Cashier Company show that on February 10, 1912, the company paid to Mr. Gernert \$150.00; the next date, February 21, 1912, \$250.00, does not appear on the company's books; the only payment mentioned in said letter which appears upon the company's books is the first entry of date February 10, 1912, for \$150.00. The books and records of the United States Cashier Company further show that at this time Mr. Gernert is indebted to the company in the amount of \$1439.27. The last entry made in the account was on the 28th day of February, 1913, being a credit for seventy-five cents commission.

Cross examination by Mr. Maguire.

The payments that were made in February,

March, April, May and June to Mr. Gernert were advances to Mr. Gernert. During this time there were credit commissions that were made to him. These were commissions for stock that had been sold prior to February, 1912. The commission would not be credited until the stock was paid for, notwithstanding the date of the sale." (Transcript of Record, pp. 226-228).

(27) The Government exhibits listed at pages 260 to 261, inclusive, of the transcript of record show a close working arrangement between Gernert and the officers of the United States Cashier Company.

Against all of this positive testimony appearing in propositions of fact numbered (i) to (xii), inclusive, appearing at pages ~~21~~ to ~~26~~ of this brief, and showing that a conspiracy existed and the extent thereof; against all of the testimony as shown in the above propositions of fact numbered (1) to (27), inclusive, set out at pages ~~27~~ to ~~45~~ of this brief showing the connection of Gernert with said conspiracy, there is no evidence in the record to explain or modify these facts except the testimony of Mr. Menefee (Transcript of Record, pp. 269-277), to the effect that Gernert was hopeful of being able to eventually obtain a contract for the sale of the machines of the company, and to the effect that Gernert was an outside man rather than an office man and had nothing to do with the management of the company; and the

statements contained in the bill of exceptions, many times repeated, to the effect that the evidence shown in the bill of exceptions was the only evidence offered that connected Gernert with the conspiracy.

That there was a gigantic conspiracy between Menefee, Todd, Campbell, LeMonn and Bonnewell, is certified in the bill of exceptions with explicit detail. The only question that we have to settle upon this branch of the case is whether or not under the law Gernert was a party to that conspiracy.

Keeping in mind, then, the above propositions of fact, and applying to them the principles of law that should govern, we confidently assert that under the law the evidence was sufficient to establish that the defendant Gernert was a member of the conspiracy and should be bound thereby.

In relation to the above mentioned propositions of fact we present the following suggestions as to the law:

It is not the duty of the appellate court to determine whether or not a verdict of guilty should have been returned, but, on the contrary, the true rule is that if there were any competent evidence at all to sustain the verdict it should be sustained.

Cohen vs. U. S., 214 Fed. 23, 27;

Hedderly vs. U. S., 193 Fed. 561;

Myers vs. U. S., 223 Fed. 919, 925;

Wilson vs. U. S., 190 Fed. 427, 438.

In a conspiracy case it is not necessary to prove that the conspirators at some designated time all got together and specifically agreed to do certain designated things in a designated manner and at a stipulated time.

U. S. vs. Cassidy, 67 Fed. 698;

Thomas vs. U. S., 156 Fed. 897, 912.

It is sufficient that if at any time prior to the commission of the several overt acts the minds of the parties or any two of them met understandingly upon one or more of the different wrongful and unlawful things that were to be accomplished.

U. S. vs. Cassidy, *supra*;

U. S. vs. Newton, 52 Fed. 275, 280;

Olson vs. U. S., 133 Fed. 849, 854, 855;

Wilson vs. U. S., 190 Fed. 427, 436;

Mitchell vs. U. S., 196 Fed. 874, 877.

It was not necessary that the conspirators should even know who their co-conspirators were or be acquainted with them.

U. S. vs. Barrett, 65 Fed., 62, 63;

U. S. vs. Cassidy, 67 Fed., 698;

U. S. vs. Newton, 52 Fed., 275, 286.

It was not necessary that every conspirator in order to be bound should know the exact part that each of his co-conspirators was to perform.

U. S. vs. Cassidy, *supra*;

U. S. vs. Newton, 52 Fed. 275, 282;

U. S. vs. Barrett, 65 Fed. 62, 63.

A conspiracy is generally proven by circumstantial evidence and the law never commands the impossible.

U. S. vs. Newton, 52 Fed. 275, 284;

Farmer vs. U. S., 223 Fed. 903, 907;

Olson vs. U. S., 133 Fed. 849, 854;

Thomas vs. U. S., 156 Fed. 897, 910;

Davis vs. U. S., 107 Fed. 753, 755.

Applying then these rules of law to the above mentioned propositions of fact we contend for them that the evidence was sufficient to go to the jury upon the question of whether or not Gernert was a member of the conspiracy and should be bound by the acts of his co-conspirators. The question was submitted to the jury under proper instructions of the court in which every safeguard was thrown around the defendant Gernert; under such circumstances, the jury having found against him, the action of the jury is final and conclusive and should not be disturbed on appeal.

We have advanced these propositions of law for the purpose of showing to the court that under the law and the fact the verdict should not be disturbed, but we would be willing to go much further than this and to state with assurance to the court that the above mentioned propositions of fact present a case under which no intel-

ligent jury could have done otherwise than to have returned a verdict of guilty. In the case of *Wilson vs. United States*, 190 Fed. 427, the court said:

“A court may almost take judicial notice of the fact that the stock of a corporation selling for twice its par value does not require the payment of such a commission to dispose of it. If it doesn't the selling price must be altogether artificial. The inference must be either that the company is fraudulent if the commission is not excessive or that the commission is fraudulent if the company is what it purports to be.” (p. 439)

In the case at bar the stock was not only selling at twice its par value but at three times its par value and under the terms of the conspiracy it was to be sold at five times its par value. The stock was purely speculative and the commission paid to the salesmen and to the president and general manager totaled fifty per cent of the individual and total amounts of the several sales.

Again, as was held by the Circuit Court of Appeals of the second circuit, in the case of *Myers vs. United States*, 223 Fed. 919:

“A man who plans to dispose of his individual stock to another by representing that it is treasury stock, so that the purchaser will suppose that the money he pays for it will pass directly to the company, instead of going into the seller's pocket, has

devised a scheme to defraud. When he has effected the sale through such misrepresentations he has defrauded his neighbor; and it makes no difference under this statute what he does with the proceeds of his fraud, the devising of the scheme is enough—plus, of course, the use of the mails.”

This proposition is also in the case at bar and is one of the things that the defendant Gernert did a great many times.

Counsel for plaintiff in error in the argument in his brief on these assignments of error starts out with the false premise that the gist of the crime charged was a scheme to sell worthless stock by means of glittering representations of fact and promises of profits. He then concludes that unless there was a guilty knowledge on the part of Gernert proven, that such stock was worthless, there could be no conscious participation in the conspiracy and no attempt to defraud, and that this is the one point which the United States must establish beyond a reasonable doubt and by competent evidence. We have detailed in our brief the testimony of various witnesses, and the exhibits admitted in evidence, which show that Gernert was very closely associated with LeMonn and Menefee, and had a secret understanding with them, which he did not even reveal to Muraine, the salesman under him, whereby he was selling the personal stock of

himself, Menefee and LeMonn upon representation to purchasers that it was the treasury stock of the company and that the money paid therefor would go into the treasury of the company. The evidence shows that he did this deliberately, that he collected his profits from these false representations, and that he knew that the stock which he was selling as treasury stock was not such. It is also shown that he received and sent numerous letters through the mail, and that he was connected with the company and with the other defendants in a business which, he must have known, as anyone would have known, it was impossible to carry on without the use of the mails. Having in mind that the conspiracy as alleged was that the defendants had agreed to sell the stock of the Cashier Company by the use of false representations, pretenses and promises, and to use the mails in furtherance and in execution of said scheme, how can it possibly be said that Gernert was not a member of this conspiracy? There was surely enough evidence to go to the jury, for them to say whether or not he was a member of this conspiracy. In this connection the argument of counsel goes on the assumption that all of the various means of carrying out the conspiracy, that is, false representations as to patents, manufacture and sale of machines, financial condition, etc., were necessary parts of the conspiracy instead of means to carry it out, and would have to be brought to the knowledge of Gernert. As shown by the authorities above cited, it is not

necessary for each conspirator to know who all the others were, or to know the exact part which each was to perform. Plainly, Gernert's part in the conspiracy, or agreement to sell the capital stock by false representations, was to sell the private stock of the officers of the company upon presentation that it was treasury stock, and that the money paid therefor would go into the treasury of the company. It is plain that he had guilty knowledge of the falsity of the representations which he made in this respect. Whether or not he knew of the falsity of some of the other representations which were to be used as a means for carrying out the conspiracy is immaterial, although we contend it may be fairly presumed from an inspection of the record that he knew of the falsity of these representations as well. The cases cited by counsel for appellant in support of his argument in this connection are directed to the proposition that the criminal intent must exist in the mind of the defendant before he can be said to be guilty of the crime charged. As a legal proposition, this is undoubtedly true, but how can it be said to have application where a man who, like Gernert, joined with others in selling stock in a corporation at double its par value and more upon the deliberately false representation that it was treasury stock of the company, and that the money paid therefor would go to increase the assets of the company and its earning power, where he knew at the time that this money would go into the pockets of himself and his part-

ners in crime—how, we say, could a man who did these things claim that he had no criminal intent.

7. ASSIGNMENTS OF ERROR NUMBERED VIII, IX AND X present the question as to the statute of limitations and the contention that the conspiracy, if there was any, was terminated and completed more than three years prior to the filing of the indictment; that none of the overt acts appearing in the indictment were committed prior to the termination of the conspiracy and effectuating its said object; that Gernert was not associated with the conspirators named in the indictment nor employed by the United States Cashier Company within three years of the finding of the indictment.

We have fully discussed the law applicable to these questions in our argument herein as to assignment of error No. III.

Inasmuch as these three assignments may be so easily grouped, they will be considered together.

The indictment was returned and filed on the 27th day of February, 1915 (Transcript of Record, p. 99).

The indictment alleged, (Transcript of Record, p. 28) and the proof showed (Transcript of Record, p. 125) that the said conspiracy should, would and did continue from a date on or about September 1, 1910, down to and including January 1, 1915, and that during all

of said times and between all of said times, the said conspiracy was in continual existence and in process of execution and that during all of said times and between all of said times the said conspirators continued to conspire together to commit the acts in the indictment set forth in detail.

It is certified in the bill of exceptions that Bonnewell, Todd, Campbell, Menefee and LeMonn were parties to said conspiracy, and we have shown by the proof that Gernert was also a member thereof and bound thereby.

The indictment alleges that overt act No. I was committed on February 6, 1914 (Transcript of Record, p. 30).

That overt act No. II was committed on July 23, 1912 (Transcript of Record, p. 32).

That overt act No. III was committed on June 7, 1912, (Transcript of Record, p. 37).

That overt act No. IV was committed on January 30, 1913, (Transcript of Record, p. 46).

That overt act No. V was committed on March 27, 1912, (Transcript of Record, p. 50).

That overt act No. VI was committed on March 28, 1912, (Transcript of Record, p. 53).

That overt act No. VII was committed on August 19, 1912, (Transcript of Record, p. 58).

That overt act No. VIII was committed on February 29, 1912, (Transcript of Record, p. 65).

That overt act No. IX was committed on July 24, 1912, (Transcript of Record, p. 68).

That overt act No. X was committed on March 5, 1912, (Transcript of Record, p. 74).

That overt act No. XI was committed on March 5, 1912, (Transcript of Record, p. 77).

That overt act No. XII was committed on April 8, 1912, (Transcript of Record, p. 83).

That overt act No. XIII was committed on April 7, 1912, (Transcript of Record, p. 89).

That overt act No. XIV was committed on August 27, 1912, (Transcript of Record, p. 94).

That overt act No. XV was committed on May 19, 1912, (Transcript of Record, p. 96).

That overt act No. XVI was committed on June 5, 1912, (Transcript of Record, p. 97).

The proof showed:

“And the plaintiff offered evidence tending to prove that in pursuance of the said conspiracy and to effect the object thereof, the defendants B. F. Bonnewell, Frank Menefee, and F. M. Lemonn committed each, every and all of the overt acts that are mentioned, specified and stated in

the indictment in the manner and at the several times and places respectively alleged and stated in said indictment." (Transcript of Record, p. 128).

Thus, it is clear that each, every and all of the overt acts alleged and proven were committed subsequent to February 27, 1912, and within three years prior to the date of the filing of the indictment.

But it is contended that the defendant Gernert if a member of the conspiracy at all was not a member of such conspiracy after January 1, 1912.

"We believe the law to be well settled that if a man be a member of a conspiracy that in order to relieve himself from the consequences thereof, he having set evil forces at work, must by some voluntary act of his own, withdraw from the conspiracy; otherwise he is to be bound by all subsequent acts.

Hyde vs. U. S., 225 U. S. 347 at 369.

But we believe that there is abundant testimony to show that Gernert was a member of the conspiracy subsequent to February 27, 1912.

The proof in this connection showed (Transcript of Record, p. 106) that Gernert was the assistant sales manager of the company until January 1, 1912. We have shown that Menefee was a member of the same conspiracy; on May 16, 1912, Menefee wrote a letter to

Gernert (Government's exhibit No. 66, Transcript of Record, p. 107), a careful reading of which letter shows that the president of the company was, on May 16, 1912, giving explicit directions to Gernert as to how he should proceed with the sale of the corporate stock of the United States Cashier Company as its agent; this letter (Government's exhibit No. 66) Gernert, through his counsel, at the trial admitted that he had received.

Government's Exhibit No. 242, being a letter of date July 12, 1912, written by Gernert to C. B. Clark (Transcript of Record, p. 150) was of and concerning the stock purchased by Mr. Clark from Mr. Gernert.

The conversation detailed by the witness Clark with Mr. Gernert took place at Portland, Oregon, in June, 1912 (Transcript of Record, p. 150).

Gernert received \$2500.00 from Clark on account of this stock transaction on August 9, 1912 (Transcript of Record, p. 154). It was on February 27, 1912, that Gernert wrote his fraudulent letter (Government's Exhibit No. 288, Transcript of Record, p. 173) to his co-conspirator LeMonn, and it was on March 2, 1912, that LeMonn wrote his co-conspirator Gernert the fraudulent reply requested by Gernert (Transcript of Record, p. 175).

The correspondence set out at pages 178 to 188, inclusive, is all dated subsequent to February 27, 1912. Many of the telegrams set out at pages 193 to 195, inclu-

sive, of the transcript of record, are all dated subsequent to February 27, 1912, and the same is true of the telegram set out at page 196 of the transcript of record. We also quote from the transcript of record at pages 226 and 227:

“The records of the company show that on December 30, 1911, a credit was made to Mr. Gernert’s account on the books of the United States Cashier Company for \$375.00, with the notation that it is for salary and expenses for five weeks from November 25, 1911, to December 30, 1911. Said records further show that on January 4, 1912, the company paid Gernert \$83.34 in cash. On January 12, 1912, \$250.00 in cash. On February 5, 1912, \$25.00 in cash. On February 8, 1912, \$75.00 in cash. On February 10, 1912, \$150.00 in cash. On April 11, 1912, \$100.00 in cash. On May 8, 1912, \$100.00 in cash. On May 25, 1912, \$100.00 in cash. On June 11, 1912, \$50.00 in cash. On July 2, 1912, \$50.00 in cash. Making a total payment in cash of \$983.34, subsequent to December 30, 1911. Mr. Gernert’s account was credited with \$513.60 on account of commissions. This would make a payment to Mr. Gernert of \$469.74 more than his commissions. In compiling these figures I have not taken into consideration any commission that Mr. Gernert might have made from the sale of private

stock; the records of the company further show that the company has paid to Mr. Gernert in cash a total of \$8170.56 during the years 1910, 1911 and 1912; that the account was opened about the 1st of April, 1910. In these figures I am not taking into consideration any sums of money or any property that Mr. Gernert may have received on account of the sale of any personal stock either belonging to himself or anybody else, and these figures are exclusive of all amounts that Mr. Gernert may have received as commissions on the sale of private stock. In reference to the statements made in Government's Exhibit 295, being a letter from LeMonn to Gernert, the books and Records of the United States Cashier Company show that on February 10, 1912, the company paid to Mr. Gernert \$150.00; the next date, February 21, 1912, \$250.00, does not appear on the company's books; the only payment mentioned in said letter which appears upon the company's books is the first entry of date February 10, 1912, for \$150.00. The books and records of the United States Cashier Company further show that at this time Mr. Gernert is indebted to the company in the amount of \$1439.27. The last entry made in the account was on the 28th day of February, 1913, being a credit for seventy-five cents commission.

Cross examination by Mr. Maguire.

The payments that were made in February, March, April, May and June to Mr. Gernert were advances to Mr. Gernert. During this time there were credit commissions that were made to him. These were commissions for stock that had been sold prior to February, 1912. The commission would not be credited until the stock was paid for, notwithstanding the date of the sale.” (Transcript of Record, pp. 226, 228.)

In addition to this, Menefee, testifying in aid of Gernert (Transcript of Record, p. 274) said that he did not think Mr. Gernert did any work *particularly* for the company after the 1st day of January, 1912, which would indicate that he did some work after that date, while one of the letters introduced in evidence by the defendant (Transcript of Record, p. 269), is dated subsequent to February 27, 1912.

Counsel for the appellant seems to rely upon the theory that if Gernert was not the assistant sales manager of the company subsequent to January 1, 1912, he could not be a member of the conspiracy. Our answer to this is that he continued to be a member of the conspiracy even if we could concede that on January 1, 1912, he ceased to hold an office in the company which he had held prior to that date.

8. ASSIGNMENTS OF ERROR NUM-

BERED XI TO XIX, inclusive, are all based upon the action of the court in refusing to give nine separate instructions to the jury.

Assignment of error No. XI is based upon the refusal to give the following instruction to the jury:

“Again, even though you should find from the evidence that fraud or injury resulted from the acts of one or more of the defendants and was brought about or executed in whole or in part by use of the mails, yet, if you would not find that there was an agreement or understanding between the defendants and all of them to devise such a scheme and to execute it in the manner hereinbefore alleged, then you must find the defendants not guilty.”

Upon this question the court did instruct the jury as follows:

“It must appear that the purpose of the conspiracy was to commit an offense against the United States, that is, to violate some law of the United States.” (Transcript of Record, p. 287).

And the court also instructed the jury as follows:

“Therefore, even though you should find that the defendants did agree together to devise a scheme to defraud, it would not be sufficient to justify their conviction unless it also appears that

it was a part of such conspiracy that the United States mails should be used for executing it. And even if injury resulted from the acts of one or more of the defendants brought about and executed in whole or in part by the use of the mails, it would not justify a conviction of such defendant or defendants unless it further appeared that the original agreement or understanding contemplated the use of the mails in furtherance of their given purpose.” (Transcript of Record, pp. 297, 298).

There were other instructions given by the court equally applicable but the foregoing are sufficient to show that the requested instruction was given almost in the exact language and at least to the same effect as the instruction requested. It is perfectly proper for the trial court, in delivering its charge to the jury, to reframe the requested instructions and to use its own language so long as the general import of the requested instruction, if proper, be given.

Assignment of error No. XII is based upon the action of the court in refusing to give the following instruction to the jury:

“Gentlemen of the Jury: You are further instructed that it is not sufficient for the government in this case to show that certain of the defendants combined to perform certain acts and

some one or more combined with others to perform different acts, even though the defendants had a similar purpose in view, but the evidence in this case must show beyond a reasonable doubt that each and all of the defendants agreed and conspired together to do these things."

The court, in dealing with this phase of the question, instructed the jury in part as follows:

"Each party to a conspiracy must be actuated by the intent to promote the common design, but he may perform separate acts, or hold distinct relations, in promoting such design." (Transcript of Record, p. 289.)

And the court also instructed the jury as follows:

"While a conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons, on different occasions, did acts of a similar nature looking toward the same end or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention. The evidence must show that the parties accused, and each of them, agreed and confederated together to do the acts charged." (Transcript of Record, p. 289).

And the court also instructed the jury as follows:

“First, there must be the act of two or more persons conspiring and confederating together. One person cannot conspire with himself, and therefore, there must be at least two persons acting together in order to constitute a conspiracy.”

(Transcript of Record, p. 287).

And the court also instructed the jury as follows:

“One cannot be made a member of a conspiracy except by his own conscious act and not by the acts and declarations of another.” (Transcript of Record, p. 291).

Assignment of error No. XIII is directed against the action of the court in refusing to give the requested instruction set out in full at page 359 of the transcript of record. A careful reading of this requested instruction shows that it is long and involved. Considering the request as a whole, the propositions of law therein stated are erroneous and could not have had any other effect than to have misled the jury. By this request the court is asked to say to the jury that in order to convict the defendants it would be necessary for the jury to find, beyond a reasonable doubt,

(a) That the defendant had an intent to defraud;
and

(b) That he had knowledge that the company did not own the patents; and

(c) That he knew the company did not intend to manufacture machines; and

(d) That he knew that the company did not have bona fide orders for its machines; and

(e) That he knew the company would not make large profits; and

(f) That he knew that the corporation was insolvent and its liabilities exceeded its assets; and

(g) That by reason of all of these things he also knew that the stock was worthless.

In other words, if the defendant, under this request, knew all of these things except one of them he could not be convicted. Of, if he knew of all of these conditions and was selling stock at \$30.00 per share upon a representation that it was worth that amount knowing that it was only worth \$5.00 per share, he could not be convicted because he would not know that it was absolutely worthless.

All of the requested instruction that was proper and applicable to the facts was given by the court, as will be shown by a reference to pages 313 and 314 of the transcript of record.

Assignment of error No. XIV is directed against the action of the court in refusing to give the requested instruction set out at page 360 of the transcript of record. The requested instruction does not state the law;

if it had been given the jury would have been instructed that before the defendant could be convicted the jury would have to be satisfied that the defendant knew that the stock he was offering for sale was absolutely worthless; under the request, even if he had made false and misleading statements in order to sell the stock at \$30.00 per share, knowing it to be worth but \$5.00 per share, and had made all of the false statements charged in the indictment, he could not be convicted if he believed that the stock had any value whatsoever. Under such a proposition of law it would be impossible for any person to violate the postal fraud statute.

Assignment of error No. XV is directed against the action of the court in refusing to give to the jury the requested instruction set out at page 361 of the transcript of record. The statement contained in the request to the effect that there is no difference between company stock and personal stock is misleading and is not the law. A man who purchases the stock of a corporation upon a representation that the money he pays is to go into the treasury of the company has been defrauded when that money is wilfully diverted into the pockets of the agent who made the sale. To illustrate, a man purchases stock in a corporation and pays \$10,000 for it upon the representation that this sum of money is to be used by the company for the purpose of building factories. Thus, he has the right to believe that this money which he is paying for the sale of the stock will be used

in such a way as to increase the dividends on the stock which are promised to be paid to him. Under such circumstances, if the money is diverted and the company receives no benefit from the transaction then the stockholder has been defrauded.

That portion of the instruction applicable and which states the law was given by the court, as is shown on page 316 of the transcript of record wherein the court instructed the jury:

“It is claimed as against both Gernert and Todd that they sold private stock, representing it to belong to the company and that the money derived therefrom would go into the treasury of the company, when in truth and in fact they appropriated the money to their own use, and the stock belonged to parties other than the corporation. Now, neither of these acts would constitute a crime within this indictment, unless you believe from the testimony, beyond a reasonable doubt, that these gentlemen knew of the alleged conspiracy, and that it was a part of such conspiracy that private stock should be sold as the stock of the corporation and upon a representation that the money derived therefrom should go into the treasury of the company.” (Transcript of Record, p. 316).

Assignment of error No. XVI is directed against

the action of the court in refusing to give the requested instruction set out at pages 361 to 362 of the transcript of record.

By this request the court was asked to say to the jury that it was no evidence of fraud against the agents if it should be established that they had received a large commission; this was a question of fact for the jury to determine for which reason alone the requested instruction was not proper. Under such an instruction there would be no presumption of fraud against an agent selling stock in a corporation at three times its par value and receiving a commission of ninety-nine per cent upon the sale. In the case under consideration the commission paid was fifty per cent and in the *Wilson case* hereinbefore quoted, the Circuit Court of Appeals of the second circuit held that *the court would almost take judicial knowledge that such a commission was fraudulent*.

That portion of the instruction applicable and proper was given by the court as is shown by reference to pages 312, 313 and 316 of the transcript of record.

Assignment of error No. XVII is directed against the action of the court in refusing to give the following instruction to the jury:

“There is no presumption from the fact that a statement is false that it is made with a fraudulent intent.”

This principle of the law so far as applicable and proper is contained in almost every instruction given by the court. It was stated to the jury so many times and in so many different ways for the benefit of these defendants that a citation to the record upon this point would make it necessary to almost set out the entire charge.

In support of this requested instruction which it is claimed should have been given in the identical language as was requested, the case of *Southern Development Company vs. Silva*, 125 U. S. 248, was cited. A careful reading of this case shows that the Supreme Court held in effect that statements of fact, to be fraudulent, must have been knowingly made and knowingly false; this proposition of law was stated by the court many times in its instructions.

Assignment of error No. XVIII is directed against the action of the court in refusing to give to the jury the instruction set out at page 363 of the transcript of record. What we have heretofore said relative to Assignment of error No. XVII is applicable to and covers fully this requested instruction.

Assignment of error No. XIX is directed against the action of the court in refusing to give to the jury the requested instruction set out at page 363 of the transcript of record.

A reference to page 312 of the transcript of record shows that this requested instruction was given by the court to the jury in the identical language of the request.

Under such circumstances it is difficult for us to believe that the assignments of error based upon the refusal to give these requested instructions are made by counsel for the appellant seriously.

As to each, every and all of these assignments of error directed against the action of the court in refusing to give certain requested instructions to the jury, it is our contention that it was within the province of the court to frame its own instructions in its own language and that if taking the charge as a whole the jury were correctly instructed as to the law, then it cannot be held that there was error.

9. ASSIGNMENTS OF ERROR NO. XX TO XXX, inclusive, are all based upon the action of the court in giving eleven instructions to the jury, and as these are all readily classified, we will treat of them altogether.

Assignment of error No. XX is based upon the action of the court in giving to the jury the instruction set out at page 364 of the transcript of record. This instruction, when read either separately or taken in conjunction with all of the other instructions given by the court, clearly states the law.

Assignment of error No. XXI, XXII, XXIII, XXIV and XXV are all based upon the action of the court in giving to the jury instructions to the effect that if the defendants knowingly made false and fraudulent representations knowing them to be untrue for the purpose of deceiving the investors and the public as to the true conditions and value of the stock, that the law would imply an intent to defraud.

We have heretofore elaborately advanced to the court our theory of the law relative to these instructions and the principles involved therein. This we did in the brief heretofore filed by us in the case of Menefee vs. United States, which case was argued before this court on May 8, 1916. A copy of our brief in the Menefee case has been served upon counsel for the appellant in the case at bar. Our argument upon these propositions of law presented by these assignments is set out at pages 110 to 170 of our brief in the Menefee case and we can see no good reason for repeating that argument here.

We might add, however, that much of our argument in the brief in the case at bar dealing with the question as to whether or not the evidence against Gernert was sufficient to justify the verdict and the quotations from the many exhibits contained in that argument are applicable for the purpose of showing upon the part of Gernert a clear intent to defraud the public.

Assignment of error No. XXVI is directed against

the action of the court in giving to the jury the instruction set out at page 369 of the transcript of record.

When this instruction is read either separately or in conjunction with all of the other instructions given by the court, we contend for it that it contains a clear, fair and concise statement of the law.

Assignment of error No. XXVII is directed against the action of the court in giving to the jury the instruction set out at page 370 of the transcript of record.

What we have heretofore said relative to assignments numbered XXI and XXV, inclusive, is applicable to this assignment.

Assignment of Error No. XXVIII and XXIX are directed against the action of the court in giving to the jury instructions set out at pages 370, 371 and 372 of the transcript of record. Our position as to both of these assignments of error is that when these instructions are read, either separately or in conjunction with all of the other instructions of the court, it is readily seen that they contain a clear, concise and fair statement of the law as applicable to the facts.

Assignment of error No. XXX is directed against the action of the court in giving to the jury the instruction set out at page 372 of the transcript of record.

This instruction is supported by what we have had to say hereinbefore with respect to continuing conspiracies.

Brown v. Elliott, *supra*;

Kissel v. U. S. *supra*;

Hyde v. U. S. *supra*.

That a conspiracy such as presented in the case at bar may be continuous is settled beyond doubt by these authorities.

The exceptions to instructions given and refused to which errors were assigned by plaintiff in error, assignments XI to XXX inclusive, are treated together in his brief. He contends in argument that the very cornerstone of the Government's case must necessarily be that defendants knew that the capital stock of the company was or would be worthless, and yet entered into a campaign for its disposal. It is claimed that Gernert did not know that the stock was worthless, and that being so, the case against him must fail, the argument being on the assumption that knowledge as to the falsity of all the representations, which it is alleged in the indictment were to be made by the defendants as to the patent situation, the financial condition of the company, and the boosting of the price of stock, must be brought home to Gernert.

Counsel here is again arguing beside the point. The indictment charges a conspiracy between the defendants to sell stock of the company by false representations, assurances and promises, and to use the mails in execution of their scheme. The indictment further alleges that misrepresentations as to the patent situation of the com-

pany, its financial condition, as to the amount of their product that they were manufacturing, as to the value of the stock, and as to whether the stock sold was treasury stock or personal stock, were various means to be used by the conspirators in carrying out the scheme alleged. As alleged and proven, one of the means of carrying out the scheme was the selling of personal stock of some of the defendants upon representation that it was treasury stock, and that the money paid therefor would be used by the company in building factories and manufacturing machines, and otherwise furthering its business. As has been shown heretofore in the argument as to the sufficiency of the evidence against Gernert, the use of this particular means of carrying out the conspiracy was employed time and time again by Gernert; in fact, it is quite plain that that was his particular part in the conspiracy. It is settled law that each member of the conspiracy may have a different part to play in the same. One may have a major part, the other only a minor part to perform. Each conspirator may not necessarily know what part the other is to perform. It is only necessary that each of the conspirators be actuated in a tacit agreement or understanding for the promotion of the common design.

Hyde v. U. S., 225 U. S. 347, 367;

Wilson v. U. S., 190 U. S. 427, 436.

Counsel further argues as to these instructions that

they took away from the jury the question of intent. As we have said before, this question has been fully discussed in our brief in the Menefee case, pages 110 to 170.

We have chronologically dealt with each, every and all of the assignments of error as they are presented and it is our contention that no prejudicial error has been committed against this defendant; we recognize that many of the propositions of law contended for by counsel for the appellants will probably be discussed and considered by the court in the Menefee case argued before this court on May 8, 1916, to the end that an extended discussion of many of these propositions could serve no useful purpose at this time.

CONCLUSION.

As we have hertofore indicated in this brief the only assignments of error which deserve serious consideration at the hands of the court are those directed against the action of the court in refusing to instruct a verdict of not guilty upon the ground that the evidence was insufficient to justify a verdict of guilty. These assignments of error become important for two reasons:

First: If the defendant Gernert were not a member of the conspiracy, then the evidence to which objection was made would be inadmissible as against him and its admission would be error. On the other hand, if he were a member of the conspiracy, then he would be bound to the same extent as the other conspirators; and,

Second: Whenever any defendant contends that the evidence against him is not sufficient, it becomes the duty of the court to carefully analyze all of the evidence for the purpose of ascertaining whether or not the claim is well founded.

In this case the court is asked to believe that notwithstanding the formation and long duration of this conspiracy to swindle the public out of \$1,500,000 established by evidence to the effect that the swindle had

been accomplished for the purpose of so defrauding the public, that there was one man connected with the enterprise whose duty it was "to train all the other salesmen;" whose title appearing upon the letterhead, by his own representations, and in the printed literature of the company was that of assistant sales manager, who sold his own personal stock and that of Menefee and LeMonn in amounts running up into thousands of dollars upon the false representation that the money was to go into the treasury of the company for the purpose of building factories, when he knew that it was to be divided between himself and Menefee; who wrote the fraudulent letter set out at page 173 of the transcript of record in which practically every fraudulent part of the conspiracy was dealt with, and treated as a joke; who was permitted by the company to have an overdraft of \$1439.27; who was, during the greater portion of the existence of the conspiracy, a willing agent in causing a large number of men to part with their money, and to give them in exchange therefor worthless securities, was the one man, who by deliberately shutting his eyes and closing his ears to all of the evidence of fraud around him rendered it impossible for him to either know or realize that anything that he was doing was either wrong or fraudulent.

We do not believe that under these circumstances this court is called upon or should be asked to give to these facts any other than a broad construction.

We think the court justly and rightly allowed the jury to determine from this evidence whether or not Gernert was a member of the conspiracy.

Bettman v. U. S., 224 Fed. 819, 827, 828.

Kaplan v. U. S., 229 Fed. 389.

We do believe that in considering this important question and in determining as to what the judgment of this court should be that the principles of common honesty and fair dealing expressed in the Wilson case are clearly applicable here, and we close with this reference from the decision of the court in that case, affirming the judgment of conviction.

“It should reach far beyond them and serve as a warning to that vast crowd of speculators, promoters, gamblers and adventurers who pose as men of business and affairs and carry on their operations in the borderland between legitimate undertakings and criminal schemes. It ought to bring home to their understanding that the misappropriation of other people’s money is not distinguished from larceny by designating the process a great corporate enterprise; that inducing hundreds of men and women to part with hundreds of thousands of dollars for worthless securities calls for condemnation just as much as cheating in the sale of a single musical instrument or photograph album; that after all there

is no merit in wholesale knavery over cheap tricks or in gilded devices over barefaced swindles, and, furthermore, that neither swindlers of high degree nor cheats of low station can employ with impunity the mails of the United States in aid of their fraudulent schemes.”

Respectfully submitted,

CLARENCE L. REAMES,

United States Attorney.

JOHN J. BECKMAN,

Assistant United States Attorney.

Attorneys for the Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
CHING LUM,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

Filed

1912

F. H. Moulton,
Clerk.

No. 2800

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
CHING LUM,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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Names and Addresses of Attorneys.

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For Respondent, RICHARD L. HALSEY, Esq.,
United States Immigration Inspector in
Charge at the Port of Honolulu:

S. C. HUBER, Esq., United States District
Attorney, Honolulu, Hawaii. [1*]

*In the United States District Court, in and for the
District and Territory of Hawaii.*

No. 73.

In the Matter of the Application of CHUNG LUM
for a Writ of Habeas Corpus.

Order Extending Time to Aug. 15, 1916, to Transmit Record on Appeal.

Now, on this 16th day of March, A. D. 1916, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited

*Page-number appearing at foot of page of original certified Record.

therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to April 15, 1916.

Dated, Honolulu, T. H., March 16th, 1916.

CHAS. F. CLEMONS,
Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 16th day of March, A. D. 1916.

THOMPSON, MILVERTON & CATHCART.

C. S. F.

[Endorsed]: #73. In the U. S. District Court, Territory of Hawaii. In the Matter of the Application of Chung Lum for Writ of Habeas Corpus. Order Extending Time. Filed Mar. 16, 1916. Geo. R. Clark, Clerk. By Wm. L. Rosa, Deputy Clerk.
[2]

*In the United States District Court, in and for the
District and Territory of Hawaii.*

No. 73.

In the Matter of the Application of CHUNG LUM
for a Writ of Habeas Corpus.

**Order Extending Time to May 15, 1916, to Transmit
Record on Appeal.**

Now, on this 15th day of April, A. D. 1916, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to May 15, 1916.

Dated, Honolulu, T. H., April 15, 1916.

CHAS. F. CLEMONS,
Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 15th day of April, A. D. 1916.

THOMPSON, MILVERTON & CATHCART.

C. S. F.

[Endorsed]: #73. In the United States *District* for the Territory of Hawaii. In the Matter of the Application of Chung Lum for a Writ of Habeas Corpus. Order Extending Time to Transmit Record

on Appeal. Filed Apr. 15, 1916. George R. Clark,
Clerk. By Wm. L. Rosa, Deputy Clerk. [3]

*In the United States District Court, in and for the
District and Territory of Hawaii.*

No. 73.

In the Matter of the Application of CHUNG LUM
for a Writ of Habeas Corpus.

**Order Extending Time to June 15, 1916, to Transmit
Record on Appeal.**

Now, on this 15th day of May, A. D. 1916, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to June 15, 1916.

Dated: Honolulu, T. H., May 15th, 1916.

CHAS. F. CLEMONS,
Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 15th day of May, A. D. 1916.

S. C. HUBER,
U. S. Attorney.

THOMPSON, MILVERTON & CATHCART.
C. S. F.

[Endorsed]: #73. United States District Court, Territory of Hawaii. In the Matter of the Application of Chung Lum for a Writ of Habeas Corpus. Filed May 15, 1916. George R. Clark, Clerk. By Ray B. Rietow, Deputy Clerk. [4]

*In the United States District Court, in and for the
District and Territory of Hawaii.*

No. 73.

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

Statement of Clerk.

TIME OF COMMENCEMENT OF SUIT.

October 18, 1913: Verified petition for writ of habeas corpus, order for issuance of writ of habeas corpus and marshal's return thereon.

NAMES OF ORIGINAL PARTIES.

Petitioner: Ching Lum.

Respondent: Richard L. Halsey, Esq., United States Inspector of Immigration in Charge at the Port of Honolulu.

DATES OF FILING OF THE PLEADINGS.

October 18, 1913: Petition.

October 22, 1913: Demurrer to petition.

October 28, 1913: Return of Richard L. Halsey, Esq., to the writ of habeas corpus.

December 1, 1913: Demurrer to return.

SERVICE OF PROCESS.

October 18, 1913: Writ issued and delivered to the United States marshal with the following return by the said United States marshal: "The within petition, order and writ of habeas corpus were received by me on the 18th day of October, A. D. 1913, at 8:40 P. M., and in obedience thereto I have served the same upon Richard L. Halsey, United States Immigration Inspector-in-Charge at the Port of Honolulu, in Honolulu, on the 18th day of October, A. D. 1913, and upon C. C. Bitting, Assistant United States District Attorney, in Honolulu, on the 20th day of October, [5] A. D. 1913, by handing to and leaving with each of them a certified copy of the within petition, order and writ of habeas corpus, and in further obedience thereto I hereby produce the body of the within-named Ching Lum forthwith before this Court. The within writ returned this 20th day of October, A. D. 1913. (Sgd.) E. R. Hendry, United States Marshal. Dated, Honolulu, T. H., October 18, 1913."

HEARINGS.

October 23, 1913: Proceedings at hearing on demurrer to petition and continuance to October 24, 1913, for decision.

October 25, 1913: Proceedings at decision overruling demurrer to petition.

December 1, 1913: Proceedings at hearing on demurrer to return and order in re briefs.

March 16, 1914: Proceedings at hearing and order taking case under advisement.

May 28, 1915: Proceedings at argument and order in re briefs.

August 2, 1915: Proceedings at decision sustaining demurrer to respondent's return and order continuing case to August 3, 1915, for taking of testimony as to length of residence of applicant.

August 4, 1915: Proceedings at supplemental decision discharging applicant under writ.

Above hearings had before the Hon. Sanford B. Dole, District Judge.

DECISIONS.

October 25, 1913: Decision overruling demurrer to petition.

August 2, 1915: Decision sustaining demurrer to respondent's return.

August 4, 1915: Supplemental decision discharging applicant under writ.

December 16, 1915: Judgment filed and entered (Dole, J.). [6]

PETITION FOR APPEAL.

February 15, 1916: Petition for appeal and order allowing same filed.

United States of America,
Territory of Hawaii,—ss.

I, George R. Clark, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective plead-

ings were filed; and account of the proceedings showing the service of the petition and writ of habeas corpus and the time when the judgment herein was rendered and the Judge rendering the same, in the matter of the application of Ching Lum for a writ of habeas corpus, Number 73, in the United States District Court for the Territory of Hawaii.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 23d day of May, A. D. 1916.

[Seal] GEORGE R. CLARK,
Clerk, U. S. District Court, Territory of Hawaii.

[7]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable SANFORD B. DOLE, Judge of
the United States District Court, in and for the
District and Territory of Hawaii:

Comes now Ching Shai, as the next friend of
Ching Lum, and respectfully shows unto your Honor
and your Honorable Court as follows, to wit:

1st. That he makes this application for the said
Ching Lum, as his next friend, on his behalf and by
his authority, for the reason that he, the said Ching
Lum, is incarcerated and now is in the custody of
R. L. Halsey, Inspector-in-Charge of Immigration,
for the United States in and for the District and

Territory of Hawaii, and that he is unlawfully held by the said R. L. Halsey, and because he is so held by the said R. L. Halsey is unable to sign this petition in his own behalf.

2d. Your petitioner further says that the said Ching Lum is a citizen of the Empire of China; that for more than 30 years last past he has been a resident of the City and County of Honolulu, Territory of Hawaii; that he, said Ching Lum, is a resident property holder, holding property in said Territory of Hawaii in the sum of \$50,000 and over; that he is a merchant and is engaged in general merchandising business conducted by [8] Sing Chan Company, in the said City and County of Honolulu.

3d. That said Ching Lum has not absented himself from the said territory for a period of more than five years last past, and your petitioner further alleges that said Ching Lum is now confined in the United States Immigration Station in said City and County of Honolulu, Territory of Hawaii, and unlawfully restrained from his liberty and prevented from being enlarged by the said R. L. Halsey, Inspector-in-Charge of Immigration as aforesaid.

4th. That said Ching Lum is not an undesirable alien within the meaning of the laws of the Territory of Hawaii.

5th. That your petitioner, acting for and on behalf of said Ching Lum, and on his authority did, on the 18th day of October, A. D. 1913, make application to the said R. L. Halsey to have said Ching Lum enlarged on bail; and then and there tendered good and sufficient securities for a bond of such amount as

said R. L. Halsey might require. That said R. L. Halsey then and there declined to enlarge the said Ching Lum, upon any bond, and stated that he was being held for investigation by the immigration authorities of the United States in and for the Territory of Hawaii.

6th. That the said Ching Lum is not now and has not been charged with the commission of any crime or offense against the laws of the United States relating to immigration.

7th. Your petitioner further says that upon his application to have the said Ching Lum enlarged upon bond, said R. L. Halsey stated to him that said Ching Lum would at his, said Halsey's convenience, be permitted a hearing, but he declined to say at what time said hearing would be held.

8th. Your petitioner further says that thereafter application was made to said R. L. Halsey for permission to allow the said Ching Lum to be represented by counsel, but the said R. L. Halsey [9] declined to permit the said Ching Lum to see or talk with counsel, and declined to have counsel represent him.

9th. That all and singular the premises are true and within the jurisdiction of your Honor and this Honorable Court.

WHEREFORE, this petitioner prays that a writ of habeas corpus be issued out of this Honorable Court by your Honor commanding the said R. L. Halsey to have and produce the body of said Ching Lum before this Honorable Court at such time and place as the Court may direct, and pending the action

hereon, that said Ching Lum be enlarged upon by such bond as your Honor may require in the premises.

Dated, Honolulu, October 18, 1913.

(Sgd.) CHING SHAI,

Next Friend of Ching Lum, Petitioner.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Ching Shai, being first duly sworn, deposes and says, that he is the petitioner named in the foregoing petition; that he has been acquainted with the said Ching Lum, the person unlawfully detained, for a period of thirty years and over; that during all of said period they have been intimately associated in social matters and business transactions; that he knows of his own knowledge that the said Ching Lum is the identical person he represents himself to be and the person now unlawfully detained by the said R. L. Halsey; that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief; that he makes this application and this verification in good faith and not for the purpose of aiding in the evasion of any of the laws of the United States, and that the reason why this verification and petition are not made by the said Ching Lum [10] is for the reason that the said Ching Lum is unable to communicate with counsel, and because of his detention as aforesaid, is unable to sign and verify the same in person.

(Sgd.) CHING SHAI.

Subscribed and sworn to before me this 18th day of October, 1913.

[Notarial Seal]

(Sgd.) BERNICE K. DWIGHT,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [11]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

**Order Directing Issuance of Writ of Habeas Corpus,
etc.**

Upon reading the foregoing petition, let a writ of habeas corpus issue as prayed for forthwith, and, upon the filing of a bond in the sum of \$1000, with good and sufficient sureties, let the said Ching Lum be released to appear before this Court on Monday, October 20th, 1913, at the hour of ten o'clock A. M., and let a copy of this petition, order and writ be served upon the Honorable R. W. Breckons, United States District Attorney, or his deputy.

Dated, Honolulu, this 18th day of October, A. D. 1913.

(Sgd.) S. B. DOLE,
United States District Judge of the District Court of
the United States in and for the District of
Hawaii. [12]

Writ of Habeas Corpus.

The President of the United States of America,
to R. L. Halsey, Inspector-in-Charge of Immigration in and for the District and Territory of Hawaii.

We strictly command and enjoin you that you have and produce before the United States District Court, in and for the District and Territory of Hawaii, forthwith, the body of Ching Lum, and that you do on the 20th day of October, A. D. 1913, at the hour of ten o'clock A. M., in the courtroom of said Court at Honolulu, disclose the cause of his imprisonment and detention, and then and there receive, undergo and have what the said United States District Court shall consider right, and in accordance with the law of the land, concerning him the said Ching Lum, and to abide the judgment of the Court in this behalf.

And we do hereby further command the United States Marshal in and for the District and Territory of Hawaii to serve this writ of habeas corpus upon the said R. L. Halsey, and make due return hereof, together with this writ.

Hereof fail not at your peril.

Witness the Honorable S. B. DOLE, Judge of the United States District Court, in and for the District and Territory of Hawaii, this 18th day of October, A. D. 1913.

By the UNITED STATES DISTRICT COURT.

[Seal]

A. E. MURPHY,

Clerk of the Above-entitled Court.

By (Sgd.) F. L. Davis,

Deputy Clerk. [13]

MARSHAL'S RETURN.

United States Marshal's Office.

The within petition, order and writ of habeas corpus were received by me on the 18th day of October, A. D. 1913, at 8:40 P. M., and in obedience thereto I have served the same upon Richard L. Halsey, United States Immigration Inspector-in-Charge at the Port of Honolulu, in Honolulu, on the 18th day of October, A. D. 1913, and upon C. C. Bitting, Assistant United States District Attorney, in Honolulu, on the 20th day of October, A. D. 1913, by handing to and leaving with each of them a certified copy of the within petition, order and writ of habeas corpus, and in further obedience thereto I hereby produce the body of the within-named Ching Lum forthwith before this Court. The within writ returned this 20th day of October, A. D. 1913.

E. R. HENDRY,

United States Marshal.

Dated, Honolulu, T. H., October 18, 1913.

[Endorsed]: No. 73. (Title of Court and Cause.)
Petition for Writ, Order and Writ. Filed Oct. 18,
1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis,
Deputy Clerk. [14]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

Bond for Appearance.

KNOW ALL MEN BY THESE PRESENTS:

That we, Hong Quon and Wong Chee, both residents of the City and County of Honolulu, Territory of Hawaii, are held and firmly bound unto E. R. Hendry, United States Marshal in and for the District and Territory of Hawaii, in the penal sum of \$1,000, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated the 18th day of October, A. D. 1913.

The condition of this obligation is such that if Ching Lum, now detained by R. L. Halsey, Inspector-in-charge of Immigration, in and for the Territory of Hawaii, and sought to be enlarged upon by a writ of habeas corpus, shall appear before the United States District Court, in and for the District and Territory of Hawaii, on the 20th day of October, at the hour of 10 o'clock A. M., as by order of Court filed herewith, he is required to do, and shall thereafter appear before said Court at such time as it may direct, then this obligation to be void, otherwise to remain in full force and effect.

(Sgd.) HONG QUON.

(Sgd.) WONG CHEE.

The foregoing bond is approved as to form, amount and sureties.

(Sgd.) S. B. DOLE. [15]

[Endorsed]: No. 73. (Title of Court and Cause.)
Bond. Filed Oct. 18, 1913. A. E. Murphy, Clerk.
By (Sgd.) F. L. Davis, Deputy Clerk. [16]

Order Continuing Hearing to October 22, 1913.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Vol. 8, page 654, Monday, October 20,
1913.

(Title of Court and Cause.)

On this day came Mr. E. M. Watson, of the firm of Thompson, Wilder, Watson & Lymer, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States Attorney, on behalf of the respondent herein, Richard L. Halsey, and this cause was called for hearing on return. Thereupon, on motion of Mr. Bitting and consent of Mr. Watson, it was by the Court ordered that this cause be continued to October 22, 1913, at 10 o'clock A. M., for hearing on said return. [17]

Order Continuing Hearing to October 23, 1913.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Vol. 8, page 658, Wednesday, October 22,
1913.

(Title of Court and Cause.)

The within cause having been called on this day for

hearing on return to the writ herein, and none of the counsel for the respective parties being present, it was by the Court ordered that this cause be continued to October 23, 1913, at 10 o'clock A. M., for hearing on said return. [18]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now Richard L. Halsey, the respondent named in the petition herein, and demurs to the petition herein filed, and for grounds of his demurrer says:

First. That the said petition and application for the writ of habeas corpus does not set forth the facts concerning the detention of the party alleged to be restrained.

Second. That the said petition does not set forth by virtue of what claim or authority the petitioner is detained.

Third. That said petition does not state, nor in any manner show that the petitioner does not know by virtue of what claim or authority the said Ching Lum is detained.

WHEREFORE, your respondent prays that the said petition may be dismissed, and the writ and order thereupon issued may be discharged, and the

petitioner remanded to the custody whence he came.

RICHARD L. HALSEY,

Inspector-in-Charge.

By (Sgd.) C. C. BITTING,

Assistant U. S. Attorney.

Dated this 22d day of October, A. D. 1913. [19]

[Endorsed]: No. 73. (Title of Court and Cause.)

Demurrer to Petition. Filed Oct. 22, 1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [20]

**Order Continuing Hearing on Demurrer to Petition
for Writ of Habeas Corpus to October 24, 1913.**

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Thursday, October 23, 1913, Vol. 8, Page
659.

(Title of Court and Cause.)

On this day came the above petitioner in person and with Messrs. F. E. Thompson, A. A. Wilder and B. S. Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, counsel for said petitioner, and also came Mr. Richard L. Halsey, the respondent herein, in person and with Mr. C. C. Bitting, Assistant United States Attorney, and this cause was called for hearing on the return of the respondent herein. Thereupon Mr. Bitting filed respondent's demurrer to the petition herein and due argument having been had thereon by respective counsel, it was by the Court ordered that this cause be continued to Oc-

tober 24, 1913, at 10 o'clock A. M., for decision on said demurrer. [21]

**Order Continuing Hearing on Demurrer to Petition
for Writ of Habeas Corpus to October 25, 1913.**

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Friday, October 24, 1913, Vol. 8, Page
661.

(Title of Court and Cause.)

On this day came the above petitioner in person and with his counsel, Messrs. A. A. Wilder and B. S. Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, and also came the respondent Richard L. Halsey, in person and with Mr. C. C. Bitting, Assistant District Attorney, and this cause was called for decision on demurrer to the petition herein. Thereupon it was by the Court ordered that this cause be continued to October 25, 1913, at 10 o'clock A. M., for decision on said demurrer. [22]

**Order Overruling Demurrer to Petition for Writ of
Habeas Corpus, etc.**

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Saturday, October 25, 1913. Vol. 8, Page
663.

(Title of Court and Cause.)

On this day came the above petitioner in person and with his counsel, Mr. A. A. Wilder and B. S.

Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, and also came Mr. Richard L. Halsey, the respondent herein in person and with Mr. C. C. Bitting, Assistant United States Attorney, and this cause was called upon for decision on demurrer to the petition herein. Thereupon the Court read its decision overruling the said demurrer and allowing the respondent until October 28, 1913, within which to file a return to the writ herein. [23]

In the United States District Court for the Territory of Hawaii.

October, A. D. 1913, Term.

No. 73.

In the Matter of the Application of CHUNG LUM
for a Writ of Habeas Corpus.

No. 74.

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

No. 75.

In the Matter of the Application of SUI JOY for a
Writ of Habeas Corpus.

October 25, 1913.

**Opinion on Demurrer to Petition for Writ of Habeas
Corpus.**

Habeas Corpus—Delay of Writ until remedies below exhausted: On a petition for habeas corpus the Court will not usually grant the writ, except under peculiar and urgent circumstances, until

the petitioner has exhausted his remedies before the authority detaining him and on appeal therefrom.

Immigration Acts—Detention of persons charged with violation thereof: Temporary detention of persons charged with offenses under the immigration acts, pending inquiry, is valid.

Arrest—Probable Cause: Arrest of persons without probable cause, unauthorized. [24]

Same—Grounds: Upon arrest of a person, he or his counsel should be informed of the grounds thereof.

Habeas Corpus: Demurrer to Petition.

THOMPSON, WILDER, WATSON & LYMER, for Petitioners.

C. C. BITTING, Assistant U. S. District Attorney, for Respondent.

The petitions in these cases claim that the persons in whose behalf the petitions are made are unlawfully restrained of their liberty and prevented from being at large by R. L. Halsey, Inspector-in-charge of Immigration; also that the said Halsey had stated that such persons were being held for investigation by the immigration authorities of the United States in and for the Territory of Hawaii, and further allege that such persons are not now and have “not been charged with the commission of any crime or offense against the laws of the United States relating to immigration.”

The precedents in habeas corpus cases in the United States courts, particularly in the Supreme

Court, emphasize and reiterate the practice that although a federal court with power to grant a writ of habeas corpus, may grant such writ and discharge the accused in advance of his trial under an indictment, it is not bound to exercise that power immediately upon the application being made for the writ, but may await the result of the trial, and in its discretion as the special [25] circumstances of the case may require, put the petitioner to his writ of error from the highest court of the State. *Ex parte Terry*, 128 U. S. 289, 302.

In the case of *Whitten vs. Tomlinson*, 160 U. S. 231, 242, and citing many cases in the Supreme Court, the Court says:

“But, except in such peculiar and urgent cases previously mentioned the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court.”

The Court has followed this practice and in the recent case of *Ryonosuke Sakaba* dismissed the petition for a writ on the ground that the applicant had not exhausted the remedies before the immigration officers, and still more recently the court refused to make any order on the petition for the writ, because the usual proceedings before the immigration officers had not taken place. This practice is, I think, a rea-

sonable one both for clients and the court. It will tend to prevent cases from being brought which ought not to be brought, and to put the court in a position to try to hear petitions where the remedies below have been exhausted, on the basis of a clear understanding. [26]

It is "clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation."

Accused of what? This expression "those accused," in the citation from *Wong Wing vs. United States*, 163 U. S. 228, 235, implies that the person held in custody is accused of something. In other words, has been arrested, in the words of the Constitution, "upon probable cause."

For the purposes of this demurrer the allegations that the persons arrested are not now and have not been charged with the commission of any crime or offense against the United States relating to immigration, must be taken as true. It cannot be argued that they might have been arrested for some other offense not relating to immigration, inasmuch as a previous allegation which must also be admitted to be true, refers to the statement of the respondent that such persons were being held for "investigation by the immigration authorities of the United States in and for the Territory of Hawaii," thus limiting

the possible grounds of arrest to offenses under the immigration laws. [27]

I know of no provision in the federal laws authorizing the arrest of anyone without probable cause merely for purpose of investigation.

If the immigration officers had informed counsel for the prisoners upon what charge they were detained, in case a charge had been made against them, such facts would have been stated in the petitions for the writs and the court would then have ascertained that the prisoners were not unlawfully deprived of their liberty, and upon such information would have been in a position to have denied the writs, leaving the prisoners to the proceedings provided by law for an investigation and treatment of such offenses as were within the jurisdiction of the Secretary of Labor and his agents.

As the cases stand, however, on the petitions and the demurrers, the Court feels compelled to overrule the demurrers and leave the respondent to state his authority and the grounds of making the arrests complained of in his return.

(Sgd.) SANFORD B. DOLE,
Judge, United States District Court.

[Endorsed]: No. 73. (Title of Court and Cause.)
Filed Oct. 25, 1913. (Decision of Dole, J., Overruling Demurrer to Petition.) A. E. Murphy, Clerk.
By (Sgd.) Wm. L. Rosa, Deputy Clerk. [28]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

**Return of Richard L. Halsey, Inspector-in-Charge of
Immigration at the Port of Honolulu, to the
Writ of Habeas Corpus Heretofore in this Cause
Issued.**

Comes now Richard L. Halsey, respondent above named, and by way of return to the writ of habeas corpus herein issued, respectfully shows:

First. That he is unable at this time, and has been unable since the service of the writ of habeas corpus upon himself to produce the body of the said Ching Lum, as by said writ ordered, because that by the order of this Court, improvidently issued, as respondent says, the said Ching Lum had been, and has been removed from his custody.

Second. That the writ herein issued, and the order for enlargement upon bail, was ordered by the Court without previous notice, as required by rule, having been given to the United States Attorney, or to the Assistant United States Attorney; [29] and by reason thereof respondent had no opportunity to call the attention of the same to the said United States Attorney, or the said Assistant United States Attorney, nor was he apprised himself until said writ and order for enlargement upon bail had been served upon him.

Third. That upon the 18th day of October, A. D.

1913, the petitioner was arrested under and by virtue or a warrant from the Acting Secretary of Labor, directed to respondent, requiring him to arrest and bring before himself for hearing, the said petitioner, upon the charge of being found receiving, sharing in or deriving benefit from a part or the whole of the earning of a prostitute; a copy of which is hereto attached and made a part hereof; that about eleven o'clock A. M. of said 18th day of October, A. D. 1913, one Ching Shai, who verifies the petition for the writ of habeas corpus in this cause, and who signed the same as next friend for the petitioner, appeared at the office of the respondent, with other Chinese, and stated that he wished to give bond for Ching Lum, Siu Joy and Wong Yuen; that the said Ching Shai was then informed by the respondent that these men had been arrested because they had property rented to prostitutes, and that they received benefits therefrom; that they would be given a hearing on the Monday following, and then would be entitled to have counsel at further hearings, and would be released upon satisfactory bond, and that if possible the bond would be given on Monday afternoon or Tuesday. That later in the day of the 18th day of October, 1913, and during the noon hour of said day, a person whom respondent afterwards learned to be Mr. Ulrich, appeared at the office of respondent and stated that he was from the office of Thompson, [30] Wilder, Watson and Lymer, and asked to see the said Ching Lum, Sui Joy and Wong Yuen, and asked why they were held; and that he was informed that the said parties were taken into custody for the violation of

section 3 of the Immigration Act, and that they were not permitted to have counsel until after a hearing had been given.

Fourth. Respondent admits that the said Ching Lum is a citizen of the Republic of China, and that he has been for many years last past a resident of the Territory of Hawaii.

Fifth. Answering paragraph five of said petition, respondent says that he did decline to enlarge the said Ching Lum at the time upon any bond, stating as a reason for said declination, that the petitioner was held for a hearing upon the charge of violation of section 3 of the Immigration Act, and was not entitled to be enlarged upon bail until such further time as in his discretion a hearing could be had and bail be allowed.

Sixth. The respondent denies paragraphs four, five and six of said petition, and says in reply to paragraph eight of said petition, that he specifically informed both the petitioner and the said representative of the firm of Thompson, Wilder, Watson and Lymer, that at such stage of the hearing as the officer before whom the hearing should be held, should deem proper, the petitioner might, if he so desired, be represented by counsel.

Seventh. That the writ of habeas corpus based upon the petition herein, was issued before a reasonable time had elapsed, or could elapse, for a hearing, as provided by law, and that the [31] detention of the petitioner at said time was not unlawful, but on the contrary was lawful and within the rights and duties of the respondent, and was made pursuant

to a law of the Congress of the United States of America, and the rules of the Department of Labor based thereon, and the detention so provided for.

Eighth. That said petition does not in any way state the facts, or show whether or not petitioner was unlawfully held by the respondent, nor are any facts stated or pretended to be stated in said petition setting forth or showing that the petitioner was unlawfully restrained of his liberty.

Ninth. That this Court had no jurisdiction over said cause, because said matter, and the subject thereof, was and is left entirely in the hands of the Secretary of Labor by the Laws of the United States, in whom alone, at said time, was vested the authority to inquire into the fact as to whether said alien petitioner was subject to arrest and deportation, and because the determination of that fact was vested alone by law in the Secretary of Labor, and that until a hearing should be had, and the full record of such hearing forwarded to the Bureau of Labor, together with any written argument submitted by the counsel for the petitioner, as provided by law, and the rules of the Department, this Court had no jurisdiction.

Tenth. That the issuance of said writ, and order for enlargement upon bail, before said hearing as provided by law, was without the jurisdiction of this Court, and if a pretended hearing of the facts in said matter involved should be attempted to be had by this Court, it would be an exercise of functions [32] of both the executive and legislative branches of the government of the United States by the Judiciary department thereof, and in contravention of

the principles of the Constitution of the United States.

Eleventh. That the respondent denies all further allegations and averments of said petition necessary to be denied, and not herein specifically denied.

Twelfth. That attached to this return and made a part hereof are the affidavits of Richard L. Halsey, Harry B. Brown, Manuel Rawlins and Moses Kauwe.

WHEREFORE, Respondent prays that the writ may be discharged, the petition dismissed, and the petitioner remanded to the custody whence he came, and that such other and further relief may be had to which the respondent may be entitled in the premises; and that the petitioner be required to pay the costs herein.

(Sgd.) RICHARD L. HALSEY,

(Sgd.) C. C. BITTING,

Assistant U. S. Attorney. [33]

“Via Commercial Pacific”

2.5 PM BDN

Oct. 17 1913.

37 USG WASHINGTON DC 25

IMMIGRATION HONOLULU

ARROW CHING LUM SIU JOY CHUN PIN
WONG YUEN KWANJIRO HARUTA RE-
CEIPTOR HATSUME HARUTA AND TOKU
SAKAI PROGNOSIS

LOUIS Y. POST,
ACTING SECRETARY.

TRANSLATION: (ARROW) ARREST FOLLOWING NAMED ALIEN (S) AND BRING BEFORE YOURSELF FOR HEARING, FORWARDING RECORD OF PROCEEDINGS TO THE DEPARTMENT.

(RECEIPTOR) ALIEN FOUND RECEIVING, SHARING IN, OR DERIVING BENEFIT FROM A PART OR THE WHOLE OF THE EARNINGS OF A PROSTITUTE.

(PROGNOSIS) ALIEN FOUND PRACTICING PROSTITUTION AFTER ENTRY. [34]

Affidavit of Richard L. Halsey.

Territory of Hawaii,

City and County of Honolulu,—ss.

Richard L. Halsey, being first duly sworn on his oath, deposes and says:

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii; that I have been a resident of Honolulu, Territory of Hawaii, since November 13, 1903; that I am inspector-in-charge of the United States Immigration Service, District of Hawaii, and have been for more than a year last past; that upon the 18th day of October, 1913, at about 11:00 A. M., Mr. Ching Shai appeared at my office, with other Chinese, and stated that he wished to give bond for Mr. Ching Lum, Siu Joy and Wong Yuen. I informed Mr. Ching Shai that these men had been arrested because they had property rented to prostitutes, and that they received benefits therefrom which was against the law; that they would be given a hearing on Monday fol-

lowing, and that they would be entitled to have counsel at further hearings, and would be released upon satisfactory bond. That, if possible, the bond would be given on Monday afternoon or Tuesday; that it would be necessary to specify in the bond the property or sureties, clearly designating the same, and as to value, and whether any incumbrances were on same. Later, during the noon hour, a man, who I have since learned was a Mr. Ulrich, appeared at my office and stated that he was from the office of Thompson, Wilder, Watson & Lymer, and asked to see Ching Lum, Siu Joy and Wong Yuen, and asked why they were held. I informed him that they were taken into custody for violation of Section 3 of the Immigration Act, that they were not permitted to have counsel until after a hearing had been given.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 25th day of October, A. D. 1913.

(Sgd.) CHAS. L. SEYBOLT. [Seal]
Notary Public, 1st Judicial Circuit, Territory of
Hawaii. [35]

Affidavit of Harry B. Brown.

Territory of Hawaii,
City and County of Honolulu,—ss.

Harry B. Brown, being first duly sworn on his oath, deposes and says:

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii, and an immigrant and acting Chinese Inspector in the United States Immigration Service. That on October 18th,

1913, Richard L. Halsey, inspector-in-charge, United States Immigration Service for the District of Hawaii, gave me a telegraphic warrant to serve on four Chinese. This warrant charged them with receiving, sharing in, and deriving benefit from the earnings of a prostitute or prostitutes. The names of the Chinese were Ching Lum, Siu Joy, Wong Yuen and Chun Pin. About 10:30 A. M. Mr. Ching Lum was found in the club rooms at Palama Junction and the warrant was then and there served on him and he was told the charges against him. He said that he did not own the houses at the present but that he had turned them over to his son. I specifically told him that he was charged in the warrant with receiving, sharing in, or deriving benefit from the earning or earnings of a prostitute or prostitutes, as he was the owner of some houses in Iwilei which were used for the purposes of prostitution, and that his bail would be \$1000, and that it would be necessary for him to have two sureties, each qualifying double the amount of the bond, and that they must qualify upon real estate. He then asked permission to telephone a friend and, I believe, mentioned the name of Ching Shai. He then went to another room where I suppose he telephoned to this friend, for he was gone three or four minutes and when he returned I asked him if he had gotten his friend and he said that everything was all right. I then left Mr. Manuel Rawlins in charge of Mr. Ching Lum and went down stairs to the Yee Shum Kee Store where Mr. Wong Yuen was located and I there served the warrant on him, telling that he was arrested on the war-

rant which charged him with receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. Mr. [36] Wong Yuen then got into a hack with Mr. Rawlins and Mr. Ching Lum, and I got into another hack and went to the Market Hardware store, which is near the fish market, where I found Mr. Siu Joy. I told Mr. Siu Joy that he was placed under arrest and charged with receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. I then took Mr. Siu Joy in the hack with me, and in company with the other hack in which were Mr. Rawlins, Mr. Wong Yuen and Mr. Ching Lum, we proceeded to the U. S. Immigration Station. We arrived there at about 11:00 A. M., Oct. 18, 1913. Mr. Ching Shai was waiting in the Immigration Office when we arrived. After placing the men in detention Mr. Rawlins and myself went out to look for the other person named in the telegraphic warrant, Mr. Chun Pin, but he was not found at his residence. We then went to Iwilei in search for Mr. Chun Pin but we were unable to locate him. We then returned to the Immigration Station. On our return, just opposite the U. S. Naval Station, we met two hacks in which there were Chinese. This a few moments after twelve o'clock, noon. Mr. Ching Shai was in one of these hacks, stopped the hack, and spoke to me. Mr. Ching Shai asked about bonds and I told him that Mr. Halsey was in charge of that. Nothing was said to Mr. Ching Shai or any member of his party as to why these Chinese were arrested or why they were detained, nor did Mr. Ching Shai ask for such information. I told Mr.

Ching Shai that they would be given a hearing Monday morning, and that bonds would then be arranged. I remember of telling him that it would take some little time to get bonds approved as the inspector-in-charge had to examine into the solvency of the bonds and after that the bonds would have to be approved by the U. S. District Attorney or his assistant as to form and execution; that the bonds would then be returned to the Immigration Office and the people released.

(Sgd.) HARRY B. BROWN. [37]

Subscribed and sworn to before me this 27th day of October, 1913.

[Seal] (Sgd.) P. H. BURNETTE,
Notary Public in and for the First Judicial Circuit,
Territory of Hawaii. [38]

Affidavit of Manuel Rawlins.

Territory of Hawaii,

City and County of Honolulu,—ss.

Manuel Rawlins, being first duly sworn on his oath, deposes and says:

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii, and an employee in the United States Immigration Service. That on October 18, 1913, I was detailed to accompany Inspector Harry B. Brown to make arrests of certain Chinese. First we went to the residence of Mr. Ching Lum, in a lane off Beretania Street, near Palama Junction. Mr. Ching Lum was not there, and we then went to the club room on the third floor of a building at Palama Junction, where we found

Mr. Ching Lum. Mr. Brown told him that he was arrested in accordance with a warrant from the Acting Secretary of the Department of Labor, and that he was charged with being the owner of some houses in Iwilei which were used for prostitution, and that he was deriving benefit from such prostitution. Mr. Ching Lum immediately said that he had turned those houses over to his son. Mr. Ching Lum then asked Mr. Brown for privilege of going to the telephone to see about bondsmen. Previously Mr. Brown had told Mr. Ching Lum that the bond in the case would be in the sum of \$1,000. Mr. Ching Lum went to the telephone alone and was gone some length of time, probably three or four minutes. When he returned he said he was ready. We then went to a store near to this building, where Mr. Wong Yuen was taken into custody. He came in the hack with Mr. Ching Lum and myself, while Mr. Brown went in another hack to the hardware store near the Fish Market, where another Chinese was taken into custody. The entire party then came to the Immigration Station. This was about 11 A. M. After putting the Chinese in detention, Mr. Brown and myself got into a hack and went to Palama, to the residence of Mr. Chun Pin. He was not to be found. We were then returning to the Immigration Station, and when about opposite the Naval Station, a few minutes after 12, noon, we met two hacks with Chinese in them, going toward town, they stopped and spoke to Mr. Brown about getting Ching Lum and the others out on bond. Mr. Brown told them they would have to see Mr. Halsey about getting bonds;

they said *that* had seen Mr. Halsey, and Mr. Brown told them that nothing could be done until Monday morning, when he would give them a hearing, and then bonds could be arranged for.

(Sgd.) MANUEL RAWLINS.

Subscribed and sworn to before me this 27th day of October, 1913.

[Seal] (Sgd.) P. H. BURNETTE,
Notary Public in and for the First Judicial Circuit,
Territory of Hawaii. [39]

Affidavit of Moses Kauwe.

Territory of Hawaii,
City and County of Honolulu,—ss.

Moses Kauwe, being first duly sworn on his oath, deposes and says:

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii, and an employee in the United States Immigration Service. That I was at my desk on the 18th day of October, 1913, and at about eleven o'clock A. M., Mr. Ching Shai, and some other Chinese, came into the office and Mr. Ching Shai stated to Mr. Richard L. Halsey that he wished to give bond for Mr. Ching Lum, Siu Joy, and Wong Yuen, and Mr. Halsey told him that the men had been arrested because they rented houses in Iwilei in which there were prostitutes, and that they derived benefit from renting the houses, and that this was against the law. Mr. Halsey told Mr. Ching Shai that Ching Lum, Siu Joy and Wong Yuen, would be given a hearing the following Monday and explained to him how after that a bond

could be made out for their release.

(Sgd.) MOSES KAUWE.

Subscribed and sworn to before me this 25th day of October, 1913.

[Seal] (Sgd.) DAVID L. PETERSON,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: No. 73. (Title of Court and Cause.)
Return of Richard L. Halsey. Filed Oct. 28, 1913.
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,
Deputy. [40]

Order Continuing Hearing to October 31, 1913.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Thursday, October 30th, 1913. Vol. 8,
Page 674.

(Title of Court and Cause.)

On this day came Mr. A. A. Wilder of the firm of
Thompson, Wilder, Watson & Lymer, counsel for
the above petitioner, and also came Mr. R. L. Halsey,
the respondent herein in person and with Mr. C. C.
Bitting, Assistant United States Attorney, and this
cause was called for hearing on respondent's re-
turn. Thereupon on motion of Mr. Wilder and con-
sent of Mr. Bitting, it was by the Court ordered that
this cause be continued to October 31, 1913, at 2
o'clock P. M. for hearing on said return. [41]

Order Continuing Hearing on Return to Writ of Habeas Corpus.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Friday, October 31st, 1913. Vol. 8, Page 675.

(Title of Court and Cause.)

On this day came Mr. C. C. Bitting, Assistant United States Attorney, on behalf of the respondent herein, neither the above petitioner or his counsel being present, and this cause was called for hearing on respondent's return. Thereupon it was by the Court ordered that this cause be continued until called up for hearing on said return. [42]

Order of Submission of Return and Demurrer to Return to Writ of Habeas Corpus.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 8, Page 708, Monday, December 1, 1913.

(Title of Court and Cause.)

On this day came Messrs. A. A. Wilder and B. S. Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States Attorney, on behalf of the respondent herein, and this cause was called for hearing on respondent's return. Thereupon a demurrer was filed to the return of respondent herein and due argument having been had

thereon by respective counsel, the said matter was by the Court taken under advisement and counsel ordered to file their briefs thereon. [43]

In the District Court of the United States, in and for the District and Territory of Hawaii.

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

Demurrer to Return to Writ of Habeas Corpus.

Comes now Ching Shai as the next friend of Ching Lum, petitioner herein, by his attorneys, Thompson, Wilder, Watson & Lymer, and demurs to the return filed herein and for grounds of demurrer alleges as follows:

First: That the said return does not set forth facts which would justify the holding of the said Ching Lum.

Second: That the said return does not show that any application setting forth the facts was made by the proper Immigration authorities for a warrant of arrest as is required by law, nor indeed, that any application at all was made for a warrant for the arrest of the said Ching Lum.

Third: That the alleged warrant of arrest does not make sufficiently definite and certain the nature of the charge against the said Ching Lum.

Fourth: That it does not appear in the said return that the said Ching Lum was permitted to be released from custody upon the furnishing of satisfactory bond as is expressly required in the said warrant of arrest and as is provided for by law.

Fifth: That it does not appear in the said return that the said Ching Lum is an alien who has ever "entered the United States" within the meaning of the law herein provided.

Sixth: That it appears in the said return that the said Ching Lum was deprived of his liberty without due process of law contrary to Article 5 of the amendments of the Constitution of the United States. [44]

THOMPSON, WILDER, WATSON & LYMER,
(By (Sgd.) B. S. U.)
Attorneys for Petitioner.

Dated, Honolulu, Dec. 1st, A. D. 1913.

[Endorsed]: No. 73. (Title of Court and Cause.)
Demurrer to the Return. Filed Dec. 1, 1913. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [45]

Order of Submission of March 16, 1914.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Monday, March 16, 1914. Vol. 9, Page
74.

(Title of Court and Cause.)

On this day came Mr. A. A. Wilder, of the firm of Thompson, Wilder, Watson & Lymer, counsel for the above applicant, and also came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, and this cause was called for hearing. Thereupon and after due argument the said cause was by the Court taken under advisement and counsel therein ordered to file briefs. [46]

Order Continuing Argument to February 6, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Saturday, January 30, 1915. Vol. 9, Page 482.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon on motion of Mr. McCarn, it was by the Court ordered that this cause be continued to February 6, 1915, at 10 o'clock A. M., for said argument. [47]

Order Continuing Argument to February 13, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Saturday, February 6, 1915. Vol. 9, Page 495.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States District Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to February 13, 1915, at 10 o'clock A. M., for argument. [48]

Order Continuing Argument to February 27, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Saturday, February 13, 1915. Vol. 9, Page 509.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon on motion of Mr. McCarn, it was by the Court ordered that this cause be continued to February 27, 1915, at 10 o'clock A. M., for argument. [49]

Order Continuing Argument to March 6, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Friday, February 26, 1915. Vol. 9, Page 525.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, whereupon it appearing to the Court that the above cause had been heretofore continued to February 27, 1915, at 10 o'clock A. M., for argument, it was by the Court ordered that the said cause be at this time continued to March 6, 1915, at 10 o'clock A. M., for such argument. [50]

Order Continuing Argument to March 13, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Saturday, March 6, 1915. Vol. 9, Page
535.

(Title of Court and Cause.)

The within cause being called on this day for argument and none of counsel for the respective parties being present, it was by the Court ordered that this cause be continued to March 13, 1915, at 10 A. M., for argument. [51]

Order Continuing Argument to April 10, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Saturday, March 13, 1915. Vol. 9,
Page 544.

(Title of Court and Cause.)

On this day came Mr. J. W. Thompson, Assistant United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to April 10, 1915, at 10 o'clock A. M., for argument. [52]

Order Continuing Argument to April 24, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Saturday, April 10, 1915. Vol. 9, Page 568.

(Title of Court and Cause.)

The within cause being called on this day for argument and none of counsel for the respective parties being present, it was by the Court ordered that this cause be continued to April 24, 1915, at 10 o'clock A. M., for argument. [53]

Order Continuing Argument to May 8, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Saturday, April 24, 1915. Vol. 9, Page 606.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to May 8, 1915, at 10 o'clock A. M., for argument. [54]

Order Continuing Argument to May 22, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Saturday, May 8, 1915. Vol. 9, Page 646.

(Title of Court and Cause.)

On this day came Mr. W. T. Carden, of the firm of Thompson and Milverton, counsel for the above applicant, and also came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to May 22, 1915, at 10 o'clock A. M., for argument. [55]

Order Continuing Argument to May 28, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Saturday, May 22, 1915. Vol. 9, Page 669.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States District Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to May 28, 1915, at 2 o'clock P. M., for argument. [56]

Order of Submission of May 28, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Friday, May 28, 1915. Vol. 9, Page 677.

(Title of Court and Cause.)

On this day came Mr. A. A. Wilder, on behalf of the above applicant, and also came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, and this cause was called for argument. Thereupon and after due argument by respective counsel, the Court ordered that the matters herein be submitted on briefs. [57]

Order Sustaining Demurrer to Return to Writ of Habeas Corpus, etc.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court: Monday, August 2, 1915. Vol. 9, Page 739.

(Title of Court and Cause.)

On this day came Mr. F. E. Thompson and A. A. Wilder, counsel for the above applicant, and also came Mr. J. W. Thompson, Assistant United States Attorney, on behalf of the respondent herein, and this cause was called for decision. Thereupon the Court read and filed its decision herein sustaining the demurrer of said applicant to Respondent's Return and allowing respondent until August 3, 1915, at 10 o'clock A. M., to contest petitioner's allegations of residence in Hawaii. [58]

**Opinion on Demurrer to Return to Writ of Habeas
Corpus.**

*In the United States District Court for the Territory
of Hawaii.*

April, A. D. 1915, Term.

No. 75.

In the Matter of the Application of SUI JOY for a
Writ of Habeas Corpus.

(Also WONG YUEN, No. 74.)

(Also CHING LUM, No. 73.)

(Also KIMI YAMAMOTO, No. 91.)

August 2, 1915.

*Immigration—Deportation—Entering the United
States:* An alien who came to the Hawaiian Is-
lands previous to their annexation to the United
States, and was living there at the time of such
annexation, cannot be said to “have entered the
United States” within the meaning of section
3 of the act of February 20, 1907, as amended by
the act of March 26, 1910, 36 Stat. 263.

*Same — Same—Same—Actual landing subject to
statutory conditions:* The provisions of the said
statute for the deportation of aliens found “to
be unlawfully within the United States,” pre-
sume an actual landing of such aliens, subject to
the conditions as to conduct set forth in the stat-
ute.

Habeas Corpus: On demurrer to return.

THOMPSON, WILDER, WATSON & LYMER,
for Petitioners Sui Joy, Wong Yuen, and
Ching Lum.

J. W. CATHCART, for Petitioner, Kimi Yamamoto.

JEFF McCARN, United States District Attorney, for Respondent. [59]

In the first three of the above cases demurrers to the petitions were overruled, whereupon the respondent filed his returns which were demurred to by the petitioners, the fifth ground of demurrer being as follows:

“That it does not appear in the said return that the said Sui Joy is an alien who has ever entered the United States within the meaning of the law herein provided.” In the fourth case, the petitioner filed a traverse to the return of the respondent, in which, among other things, she raised the same point as raised on the fifth ground of the said demurrers, to wit, that she was not subject to the immigration laws of the United States, having come to the Hawaiian Islands while they were under the jurisdiction of the Republic of Hawaii.

The argument on this point is, briefly, that the petitioners, having come to the Hawaiian Islands previous to annexation, as alleged, and being domiciled residents here at the time of annexation, the statute does not apply to them, such persons, although aliens, not having “entered” the United States.

The following is the immigration rule applying to these cases:

“The application must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained. The application must be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where landing occurred), or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form provided for such certificates. Telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained.” Immigration Rule 22, subdivision 2. [60]

The statute under which the petitioners are held is a part of section 3 of the act of February 20, 1907, as amended by the act of March 26, 1910, 36 Stat. 263. It is as follows:

“Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution *after such alien shall have entered the United States*, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prosti-

tutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States, and shall be deported in the manner provided by sections 20 and 21 of this act."

The demurrers are allowed on the fifth ground. It is obvious from a reading of division 2 of Immigration Rule 22, above quoted, that the Commissioner General of Immigration and the Secretary of Labor, who are authorized by the Immigration Act of February 20, 1907, 34 Stat. 898, sec. 22, to establish rules for carrying out the provisions of the act, have construed the act on the point referred to, as meaning an actual entry or landing in the United States. The said division 2 of the 22d rule, in providing for an application by the immigration officers to the Secretary of Labor for authority to arrest an alien suspected of being unlawfully in the United States, requires, among other things, that the application "shall be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where the landing occurred), or a reason given for its absence." Of course this can refer to nothing else than an actual landing in the United States. This construction is rendered still more positive by the "certificate of landing" required by the rule to accompany the application. The blank form provided by the Secretary of Labor and the Commissioner [61] General of Immigration under the authority of the statute, is as follows: "Form 564.

Certificate as to Landing of Alien (To accompany application for warrant of arrest).

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

_____, 190 —

I hereby certify that I have examined the records of the immigrant station at — with reference to the record of the landing or entry of —, an alien, and that the following facts relative to such landing or entry are disclosed by said records.

- (1) Name of alien, —; age, —; sex, —;
- (2) Race, —; country whence alien came, —;
- (3) Exact date and port of arrival in the United States, —.

(4) Name of vessel and line, — (If alien arrived via Canada or Mexico, so state.)

(5) Destination, —.

(6) Occupation, —; money brought, \$—.

(7) By whom passage paid, —.

(8) Whether ever in United States before, —.

(9) Whether inspected at time of arrival, —

(If held for special inquiry, so state.)

Remarks: _____

(Signature _____.

Official title), _____.”

Such construction, being authoritative and official, is entitled to great weight. Endlich's Interpretation of Statutes, s. 357.

Counsel in the Sui Joy, Ching Lum and Wong Yuen cases, set forth somewhat exhaustively the constitutional argument that Congress derived its

power to legislate as to immigrant aliens after being admitted, solely from section 8 of the first article of the Constitution of the United States, which gives it the power "to regulate commerce with foreign nations." Quoting from the brief, "the [62] theory is that commerce with foreign nations includes not only an exchange of commodities, but also the importation or incoming of passengers. The proposition that Congress has no power to regulate the affairs of individual persons in the United States except as incidental to some one of the powers expressly given to it by the Constitution, is fundamental." It follows therefore that whereas Congress may permit an alien immigrant to land under certain conditions as to conduct thereafter while in the country, involving forcible deportation upon his failure to conform to such conditions, it may not deport alien residents for similar conduct, with whom there has been no such conditional entry into the United States. In other words, an alien resident of the United States in regard to whom there was no condition as to his conduct during his residence, that was made the basis of his landing or entry into the country by a then existing statute, is not within the scope of section 3 of the Immigration Act of February 20, 1907, as amended by the act of March 26, 1910. Plainly the law does not affect persons who have not *entered* the United States previous to doing the acts charged. These petitioners all claim to have been living in Hawaii before and at the time of annexation. In matters of immigration the word *enter* has not acquired a technical meaning. It

would appear that these cases might well have been disposed of on their inception, on the ground that the statute is too clear to require interpretation. "*Absoluta sententia expositore indiget*" Potter's Dwaris, 128; Vattel's first rule, id. 126.

As the ruling on this ground of the demurrer disposes of the cases, the Court need not consider the [63] other grounds.

It is not clear whether there remains a question of fact to be decided. The returns in the first three cases do not specifically deny the allegations of residence in Hawaii before annexation, but make a general denial of all further allegations and averments of said petitions necessary to be denied. The return in the fourth case accepts the allegation of the petition in that case that the petitioner arrived in Hawaii in the year 1897, as correct. She (Kimi Yamamoto) is, therefore, under the foregoing conclusions, entitled to her discharge under the writ, which is hereby ordered.

If the respondent desires to contest the allegations of residence in Hawaii, in the three first cases, an opportunity will be given, otherwise such petitioners will be discharged.

(Sgd.) SANFORD B. DOLE,
Judge of the United States District Court for the
Territory of Hawaii. [64]

Supplementary Decision.

On the afternoon of the day the foregoing decision was given in open court, counsel on both sides filed the following stipulation:

"It is hereby stipulated and agreed by and between the United States of America through

J. W. Thompson, its assistant District Attorney of the District and Territory of Hawaii, and Sui Joy, Ching Lum and Wong Yuen, by their attorneys, Thompson & Milverton, that each of said petitioners were residents of the Hawaiian Islands for a period of more than five (5) years prior to the 15th day of June, A. D. 1900."

By which stipulation it would appear that the said petitioners were residents here for over three years before the annexation of Hawaii to the United States, which took place August 12, 1898. The Court was thereupon prepared to order the discharge of the petitioners according to the conclusions of the foregoing decision, but before such order was effectuated the assistant district attorney, acting for the respondent, moved the Court for an opportunity of showing that the petitioners severally visited China after annexation and returned again to Hawaii.

Such motion must be denied, inasmuch as the cases contain no pleadings which would form a basis for such testimony—as there is no showing that such information is newly discovered and as such information, if it exists, obviously has been, during the pendency of these proceedings, within the reach of the respondent.

The writs are made absolute and the petitioners discharged.

(Sgd.) SANFORD B. DOLE,
Judge of the United States District Court for the
Territory of Hawaii.

Honolulu, T. H., August 4, 1915. [65]

[Endorsed]: No. 73. (Title of Court and Cause.)
Decision of Dole, J., on Demurrer to Return. Filed
August 2, 1915. A. E. Murphy, Clerk. By (Sgd.)
F. L. Davis, Deputy Clerk. Supplementary Deci-
sion. Filed Aug. 9, 1915. A. E. Murphy, Clerk.
By (Sgd.) Wm. L. Rosa, Deputy Clerk. [66]

Order Continuing Cause to August 4, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Tuesday, August 3, 1915. Vol. 9, Page
741.

(Title of Court and Cause.)

On this day came Mr. F. E. Thompson, of the firm
of Thompson and Milverton, counsel for the above
applicant and also came Mr. J. W. Thompson, Assist-
ant United States Attorney, on behalf of the re-
spondent herein, and this cause was called for fur-
ther disposition. Thereupon it was by the Court
ordered that this cause be continued to August 4,
1915, at 10 o'clock A. M., for further disposition.
[67]

Order Discharging Petitioner.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court: Wednesday, August 4, 1915. Vol. 9,
Page 743.

(Title of Court and Cause.)

On this day came Mr. F. E. Thompson of the firm
of Thompson and Milverton, counsel for the above

applicant and also came Mr. J. W. Thompson, Assistant United States Attorney, on behalf of the respondent herein, and this cause was called for further disposition. Thereupon it appearing from the stipulation of counsel that the within applicant was a resident of the Hawaiian Islands for the period of more than five years prior to the 15th day of June, 1900, it was by the Court ordered that said applicant be discharged under the writ herein. [68]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

October, A. D. 1915 Term.

No. 73.

In the Matter of the Application of CHING LUM
for a Writ of Habeas Corpus.

Judgment.

At the regular April, A. D. 1915 term of the District Court of the United States in and for the District and Territory of Hawaii, held in the courtroom of said court, City and County of Honolulu, in the Territory of Hawaii and the district aforesaid, on the 2d day of August, 1915, the above-entitled matter having heretofore been heard on the pleadings, evidence adduced before the Court, and argument of counsel for the respective parties, and due deliberation thereon, the Court finds that the above-named petitioner Ching Lum is entitled to be discharged, subject to the taking of an appeal by the respondent herein, Richard L. Halsey, in which case the said

applicant Ching Lum will be required to give a recognizance with surety in the sum of \$500 to answer the judgment of the appellate court.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the above-named petitioner Ching Lum, be, and he is hereby discharged from custody herein, subject to the taking of an appeal, and subject to exception by the United States of America. [69]

And the Court being advised that the above-entitled cause will be removed to the Appellate Court by proper proceedings to be had in that behalf, does hereby further order, adjudge and decree that the above-named Ching Lum give his recognizance with surety in the sum and amount of \$500, to answer the Judgment of the Appellate Court.

Given, made and dated at Hononlulu, Territory and District aforesaid, this 16 day of December, A. D. 1915.

(Sgd.) SANFORD B. DOLE,
Judge, U. S. District Court.

[Endorsed]: No. 73. (Title of Court and Cause.) Judgment, Entered in J. D. Book 2, at folio #654. Filed Dec. 16, 1915. F. L. Davis, Clerk. By (Sgd.) Ray B. Rietow, Deputy Clerk. [70]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of CHING LUM for a
Writ of Habeas Corpus.

Petition for Appeal.

To the Honorable CHARLES F. CLEMONS, Judge
of the Above-entitled Court:

The United States of America, by its attorney,
Horace W. Vaughan, conceiving itself aggrieved by
the order and judgment entered on the 16th day of
December, A. D. 1915, in the above-entitled proceed-
ing, does hereby appeal from the said order and
judgment to the Circuit Court of Appeals for the
Ninth Circuit, and files herewith its assignment of
errors intended to be urged upon appeal, and it prays
that its appeal may be allowed, and that a transcript
of the record of all proceedings and papers upon
which said order and judgment was made, duly au-
thenticated, may be sent to the Circuit Court of Ap-
peals for the Ninth Circuit of the United States.

Dated this 31 day of January, A. D. 1916.

(Sgd.) HORACE W. VAUGHAN,

United States Attorney.

Received a copy of the above petition:

By His Attorneys,

[71]

[Endorsed]: No. 73. (Title of Court and Cause.)
Petition for Appeal. Filed February 15th, 1916.
(Sgd.) F. L. Davis, Clerk. [72]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of CHING LUM for a
Writ of Habeas Corpus.

Order Allowing Appeal.

Upon application and motion of Horace W. Vaughan, United States Attorney for the District and Territory of Hawaii:

IT IS HEREBY ORDERED, that the petition for appeal, heretofore filed herein by the United States of America, be, and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment heretofore, on December 16th, 1915, filed and entered herein, be, and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which said final order and judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the clerk of this court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California.

Dated, this 31st day of January, A. D. 1916.

(Sgd.) CHAS. F. CLEMONS,

Judge U. S. District Court.

Received a copy of the above order:

By His Attorneys,

[Endorsed]: No. 73. (Title of Court and Cause.)
Order Allowing Appeal, Filed Feb. 15th, 1916.
(Sgd.) F. L. Davis, Clerk. [74]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of CHING LUM for a
Writ of Habeas Corpus.

Assignment of Errors.

And now comes the United States of America, by Horace W. Vaughan, its attorney, and says that in the record and proceedings in the above-entitled matter there is a manifest error and that the final record and judgment, made and entered in said matter on the 16th day of December, A. D. 1915, is erroneous and against the just rights of the said United States, in this, to wit:

I.

That the Court erred in assuming jurisdiction in this matter because it appears by the petition and record presented, that the writ was improperly issued.

II.

That because the rule of this court and the practice and rules of the Supreme Court of the United States and of the Circuit Court of Appeals for the Ninth Circuit require that in matters of this kind a copy of the record upon which the warrants for deportation were issued, should accompany the petition, and that no such record was attached to the petition for the writ of habeas corpus, and by reason thereof,

the said writ was improvidently and improperly issued. [75]

III.

That because the rule of court in this jurisdiction requires that the office of United States Attorney shall have notice of the application for a writ of habeas corpus one hour preceding the application therefor, and no such notice was served upon the United States Attorney or his assistant, or in said office; that therefore the writ was issued in violation of the rule of this court.

IV.

That the record as presented shows, from all the testimony adduced, that the petitioner was deriving benefit from the earnings of a prostitute, and that the finding thereon was conclusive upon this court and the court had no jurisdiction to inquire further into the facts of the case.

V.

That the Court erred in holding that because the petitioner, who was admitted to be an alien, and a citizen of the Republic of China, was without the Immigration Laws of the United States prohibiting the entrance of aliens, by reason of the fact that the petitioner had previously been a resident of the Kingdom or Republic of Hawaii, and before the annexation of Hawaii to the United States or the taking effect of the Organic Act providing for the Territory of Hawaii.

VI.

That the Court erred in holding that because the petitioner had become a resident of Hawaii before

the annexation of Hawaii to the United States, therefore petitioner did not come within the rules as prescribed by the statute, against the entry of an alien found to be deriving benefit from the earnings of a prostitute. [76]

VII.

That the Court erred in refusing to hold that although the petitioner was admittedly an alien and a citizen of the Republic of China, the petitioner was not amenable to the prohibitive laws of entrance, nor to the deportation laws of the United States.

VIII.

That the Court erred in holding that a Chinese citizen of the Republic of China, although domiciled in the Territory of Hawaii before the annexation thereof to the United States of America, was not amenable to deportation, although proven to be receiving the proceeds of earnings by a prostitute, and that because the petitioner had been in the Territory of Hawaii before annexation, he was privileged, although an alien and a citizen of the Republic of China, to receive the earnings of a prostitute and not be amenable to the laws of the United States providing for the deportation of an alien so receiving such earnings.

IX.

That in any proceedings upon the hearing, such as was had, the Court was without authority of law and a hearing under said petition and a ruling of the court made upon such hearing was trenching upon the duties of the executive branch of the Government.

WHEREAS, by the law of the land, the said application for a writ of habeas corpus should have been denied, and the said writ of habeas corpus should have been discharged, and the said applicant and petitioner should have been remanded to be dealt with according to law. [77]

And the aforesaid United States of America now prays that the order and judgment of December 16th, 1915, hereinabove mentioned, may be reversed, annulled, and held for naught, and that it, said United States, may have such other and further relief as may be proper in the premises.

Dated, this 31 day of January, A. D. 1916.

(Sgd.) HORACE W. VAUGHAN,

United States Attorney.

Received a copy of the above Assignment of Errors:

_____,
By _____,
His Attorneys.

[Endorsed]: No. 73. (Title of Court and Cause.)
Assignment of Errors. Filed Feb. 15, 1916. (Sgd.)
F. L. Davis, Clerk. [78]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of CHING LUM for a
Writ of Habeas Corpus.

Citation on Appeal.

United States of America,—ss.

The President of the United States, to Ching Lum,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the Territory of Hawaii, wherein the United States of America is appellant, and you, Ching Lum, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 15 day of February, A. D. 1916, and of the Independence of the United States the one hundred and fortieth.

CHAS. F. CLEMONS,

Judge, U. S. District Court.

Attest: F. L. DAVIS,

Clerk U. S. District Court.

Received a copy of the within citation:

By His Attorneys,

_____. [79]

[Entered]: No. 73. In the District Court of the United States for the Territory of Hawaii. In the Matter of the Petition of Ching Lum for a Writ of Habeas Corpus. Citation on Appeal. Filed Feb. 15th, 1916. F. L. Davis, Clerk. By _____, Deputy.

In the United States District Court for the Territory of Hawaii.

In the Matter of the Petition of CHING LUM, for a Writ of Habeas Corpus.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition, Order and Writ of Habeas Corpus; filed October 18, 1913.
2. Bond; filed October 18, 1913.
3. Demurrer to Petition; filed October 22, 1913.
4. Decision Overruling Demurrer to Petition; filed October 25, 1913.
5. Return of Richard L. Halsey to Writ of Habeas Corpus; filed October 28, 1913.
6. Demurrer to the Return; filed December 1, 1913.
7. Decision on Demurrer to Return; filed August 2, 1915.
8. Supplementary Decision; filed August 9, 1915.
9. Judgment; filed December 16, 1915.

10. Petition for Appeal; filed February 15, 1916.
 11. Order Allowing Appeal; filed February 15, 1916.
 12. Assignment of Errors; filed February 15, 1916.
 13. Citation on Appeal; filed February 15, 1916.
 14. All minute entries in above-entitled cause.
- [80]
15. This Praeceptum.

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, before the 15th day of March, A. D. 1916.

THE UNITED STATES OF AMERICA.

By (Sgd.) HORACE W. VAUGHAN,
United States Attorney.

[Endorsed]: No. 73. (Title of Court and Cause.)
Praeceptum for Transcript. Filed February 15, 1916.
(Sgd.) F. L. Davis, Clerk. [81]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 73.

In the Matter of the Petition of CHING LUM, for
a Writ of Habeas Corpus.

United States of America,
District of Hawaii,—ss.

I, George R. Clark, Clerk of the District Court of

the United States for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 82, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the matter of the Petition of Ching Lum for a writ of habeas corpus, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal and three (3) orders extending time to transmit record on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$20.55, and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 23d day of May, A. D. 1916.

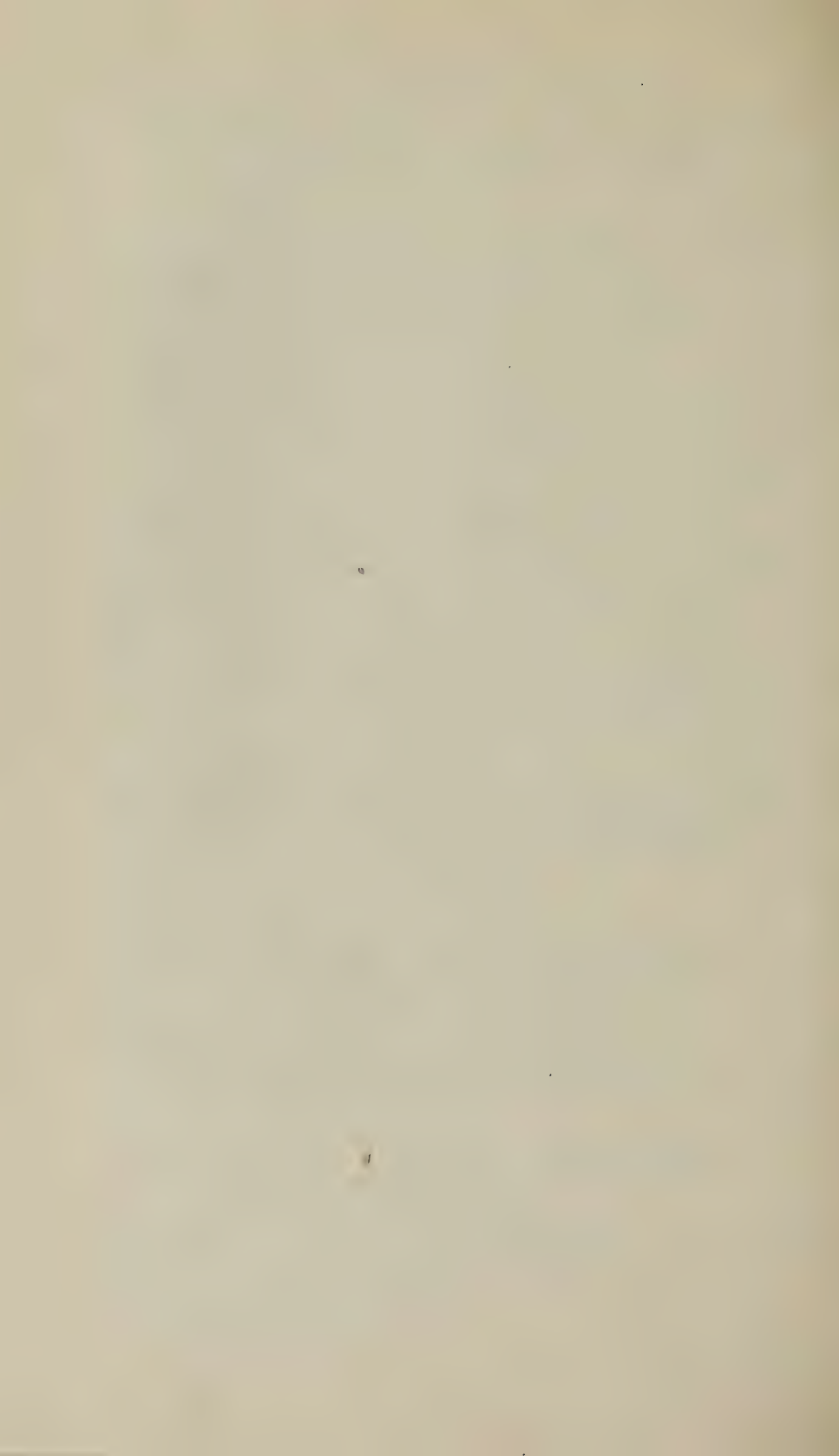
[Seal] GEORGE R. CLARK,
Clerk, United States District Court, Territory of
Hawaii. [82]

[Endorsed]: No. 2800. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Ching Lum, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed June 2, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

VS.

SUI JOY, *Appellee.*

No. 2802

UNITED STATES OF AMERICA,
Appellant,

VS.

WONG YUEN, *Appellee.*

No. 2801

UNITED STATES OF AMERICA,
Appellant,

VS.

CHING LUM, *Appellee.*

No. 2800

BRIEF OF APPELLANT

Upon the Appeal from the United States District Court for the
Territory of Hawaii, in the above entitled cases.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellant.

Filed

Filed this.....day of October, 1916.

OCT 5 - 1916

FRANK D. MONCKTON, Clerk.

F. D. Monckton,

By....., Deputy Clerk.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	<i>Appellant,</i>	} No. 2802
VS.		
SUI JOY,	<i>Appellee.</i>	

UNITED STATES OF AMERICA,	<i>Appellant,</i>	} No. 2801
VS.		
WONG YUEN,	<i>Appellee.</i>	

UNITED STATES OF AMERICA,	<i>Appellant,</i>	} No. 2800
VS.		
CHING LUM,	<i>Appellee.</i>	

BRIEF OF APPELLANT

Upon the Appeal from the United States District Court for
the Territory of Hawaii, in the above entitled cases.

Inasmuch as the facts in the above entitled cases are the same with the exception that each case deals with a different name and alien, and inasmuch as the pleadings and the judgments of the Court are the same in each instance, the Government desires to make this brief cover each case.

Statement of Case

On the 18th day of October, A. D. 1913, alien Sui Joy, and the other aliens in the above entitled causes, were arrested under and by virtue of the warrant cabled from the Acting Secretary of Labor, which when translated, reads as follows:

“Arrest following named alien(s) and bring before yourself for hearing, forwarding record of proceedings to the Department.

Alien found receiving, sharing in, or deriving benefits from a part or the whole of the earnings of a prostitute.

Alien found practicing prostitution after entry.”

Following the arrest a petition for a writ of habeas corpus was filed on behalf of the said Sui Joy (as well as the other aliens above mentioned) (Trans. pp. 8-9-10-11).

A demurrer was interposed by the Government but it was overruled by the Court and a writ issued.

The Government then filed a return (Trans. pp. 25-26-27-28-29) and to this return the said Sui Joy interposed a demurrer (Trans. pp. 39-40), which was sustained by the Court by a written opinion (Trans. pp. 49-50-51-52).

In the present case (which applies to the other cases in the above entitled causes) Sui Joy came to the Hawaiian Islands before the said Islands were annexed to the United States, and while the an-

nexation of those Islands did not affect the status of said alien, yet, the lower court held that since said alien was in the Hawaiian Islands at the time they were annexed to the United States, that said alien had never "entered the United States" within the meaning of the law.

Law Involved and Brief Argument of Points Concerned

By sustaining the demurrer to the Government's return, as was done in this case (and also in the other cases) and discharging the said alien, the Court necessarily took the view that the facts of this case did not give the immigration officers jurisdiction, for had the immigration officers jurisdiction, the Court could not have entertained the petition for a writ of habeas corpus until said alien had exhausted his remedies with the Department of Labor.

U. S. vs. Sing Tuck, 194 U. S. 161.

Section 3 of the Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, provides:

" * * * Any alien who shall be found an inmate of, or connected with the management of a house of prostitution, or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prosti-

tution, or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by Sections 20 and 21 of this Act."

Section 22 of said Immigration Act provides that the Commissioner General of Immigration

"shall establish such rules and regulations, prescribe such forms of bond, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens, etc., * * *."

In pursuance to the above authority, the Commissioner General of Immigration has formulated a set of rules for the purpose of carrying into effect the Immigration Laws, and the lower court, in determining the demurrer in this case (as well as in the other cases) adversely to the Government, has given the said rules a wrong interpretation and a prominence uncalled for, and in this connection the Court said:

"It is obvious from a reading of Division 2 of Immigration Rule 22, above quoted, that the Commissioner General of Immigration and the Secretary of Labor, who are authorized by the Immigration Act of February 20, 1907, 34 Stat. 898, Sec. 22, to establish rules for carrying out the provisions of the Act, have construed the Act on the point referred to, as meaning an

actual entry or landing in the United States. The said Division 2 of the 22nd Rule, in providing for an application by the immigration officers to the Secretary of Labor for authority to arrest an alien suspected of being unlawfully in the United States, requires, among other things, that the applicant 'shall be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where the landing occurred) *or a reason given for its absence.*' Of course this can refer to nothing less than an actual landing in the United States."

It is true that the rules referred to above provide that "the application must be accompanied by a certificate of *landing* * * * or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form, provided for such certificate."

It is also true that said Section 3 of the said Immigration Act, in referring to aliens practicing prostitution, says: "*after such alien shall have entered the United States,*" but by using the words "landing" and "entered," Congress certainly did not intend to grant *some* aliens greater rights than others. In other words, Congress never intended to give aliens in the Hawaiian Islands the right to engage in prostitution and at the same time deny aliens in the mainland of the United States that privilege.

The Immigration Act applies to all aliens alike; it matters not whether said aliens are in the Hawaiian Islands or in the mainland of the United States.

In the present case the alien, Sui Joy, was not in the United States, within the meaning of the Immigration Act, or otherwise, until the Hawaiian Islands were annexed August 12, 1898. It was at this time that the said Sui Joy "entered" the United States and the mere fact that he arrived in the Hawaiian Islands in the year 1897, prior to said annexation, does not exempt him from the Immigration Act and give him rights not enjoyed by other aliens.

The charge against the said Sui Joy is one of the most serious provided for in the Immigration Act, and as evidence of this, an alien may be deported on said charge any time he may be found, thus taking him out of the *three years' period* provided for in Sections 20 and 21 of said Act.

Zakonaite vs. Wolf, 226 U. S. 272;

Bugazwitz vs. Adams, 228 U. S. 584.

The provisions of said Section 3 governing the present case (and the other cases), specially eliminate the idea of an entry or a landing by stating "any alien who shall be found an inmate of, or connected with the management of a house of prostitution or *practicing prostitution after such alien*

shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute."

"Entering" the United States refers only to aliens *practicing prostitution*, while the charge against Sui Joy applies to "any alien who shall * * * receive, share in, or derive benefit from any part of the earnings of any prostitute," as well as "practicing prostitution after entry."

Therefore, and in conclusion, the Government desires to emphasize two points; namely, first: that the said Sui Joy entered the United States when the Hawaiian Islands entered through annexation, and second: that the charge placed against the said Sui Joy applies to *any alien* found in the United States, and it matters not under what circumstances he came.

As stated in the beginning, the three aliens referred to in the above entitled causes, were arrested at the same time, subjected to the same treatment, governed by the same pleadings and rulings of the Court, and this brief is written with the idea of covering all three cases.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellant.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

No. 2802.

UNITED STATES OF AMERICA, }
Appellant, }
vs. }
SUI JOY, }
Appellee. }

No. 2801.

UNITED STATES OF AMERICA, }
Appellant, }
vs. }
WONG YUEN, }
Appellee. }

No. 2800.

UNITED STATES OF AMERICA, }
Appellant, }
vs. }
CHING LUM, }
Appellee. }

Filed

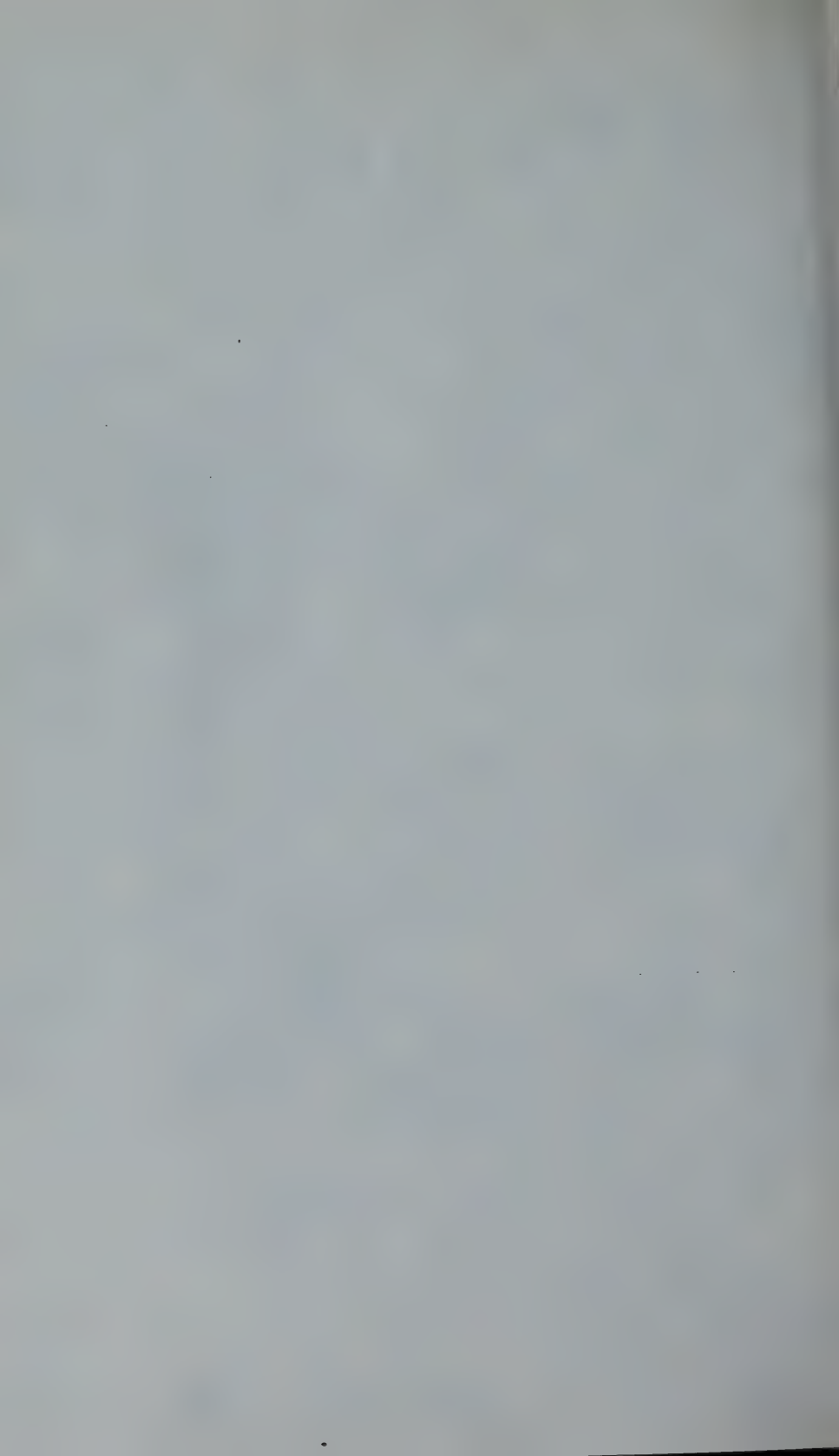
OCT 13 1916

F. D. Monckton,
Clerk.

BRIEF OF APPELLEES.

Upon Appeal from the United States District Court for the
Territory of Hawaii, in the Above-entitled Cases.

E. A. MOTT-SMITH,
W. L. STANLEY,
STANLEY & WILDER,
Attorneys for Appellees.



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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2802.

UNITED STATES OF AMERICA,

Appellant,

vs.

SUI JOY,

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No. 2801.

UNITED STATES OF AMERICA,

Appellant,

vs.

WONG YUEN,

Appellee.

No. 2800.

UNITED STATES OF AMERICA,

Appellant,

vs.

CHING LUM,

Appellee.

Brief of Appellees.

Upon the Appeal from the United States District
Court for the Territory of Hawaii, in the Above-
entitled Cases.

By stipulation approved by the Court, it has been
agreed by and between the counsel representing the
parties that one brief may be filed by the appellant
and one by counsel representing the three above-
named appellees, and pursuant to such stipulation

this brief, in reply to that of the Government, is filed to cover each case.

STATEMENT OF THE CASE.

The appellees agree to and adopt the statement of the case made by the appellant except in the following particular:

The last clause in the translation of the cabled instructions for the arrest of the appellees, namely, "Alien found practicing prostitution after entry," presumably refers to others named in the instructions and directs their arrest on that charge, and has no reference to the appellees.

Law Involved and Argument.

The Government rests its case against the appellees on two grounds:

(1) That the appellees, although residents of the Hawaiian Islands before annexation, *entered* the United States through annexation, and

(2) That the charge placed against the appellees "applies to *any alien* found in the United States, and it matters not under what circumstances they came."

(Appellant's Brief, page 7.)

We take it that the Government bases the above contentions under its Assignment of Errors numbered 5, 6, 7 and 8, which, while inartistically drawn by counsel other than those now appearing for the Government, may reserve the questions now presented for review. The remaining assignments of error are not argued by the Government, and we assume that they have been abandoned. We so as-

sume because they relate partly to questions of procedure as to the issuance of the writs—questions which are not now raised by the Government—and in part are drawn on the erroneous theory that a hearing on the charges had taken place before the immigration officers, and that the latter had found the charges established.

As stated by the Government (Brief, page 3), the Court below necessarily took the view that the facts of these cases did not give the immigration officers jurisdiction, otherwise the Court could not have entertained the petitions until the aliens had exhausted their remedies with the “Department of Labor,” citing

U. S. vs. Sing Tuck, 194 U. S. 161.

The following cases also are authority for the proposition that the question of the jurisdiction of the immigration officers have been raised *in limine*, a person arrested may have the benefit of a writ of *habeas corpus*, and that the action of the Court below, in issuing the writs, was authorized and not premature:

Gonsalves vs. Williams, 192 U. S. 1, 13, 15.

U. S. vs. Wong Kim Ark, 169 U. S. 649.

Ex parte Royall, 117 U. S. 241.

Whitfield vs. Hanges, 222 Fed. 745, 751.

I.

The appellees contend that Section 3 of the Act of 1907, as amended by the Act of March 26, 1910, Chapter 128, Section 2, does not apply to them by reason of the fact that they did not enter the United States within the meaning of the Immigration Acts.

The appellees are and, as is conceded by the Government, have been for many years prior to their arrest alien residents of the Hawaiian Islands, and were such at the time of the annexation of the Islands to the United States.

The provisions of the statute under which the appellees were arrested presume an actual entry and landing in the United States, and are only applicable to such aliens as do enter the United States within the meaning of the statute.

Section 3 of the Act of 1907, as amended, reads in part as follows:

“Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution *after such alien shall have entered the United States*, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in, or in connection with any house of prostitution or music or dance-hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by Sections 20 and 21 of this Act.”

By Section 22 of the Act it is provided that the Commissioner-General of Immigration shall, under the direction of the Secretary of Labor, “have charge

of the administration of all laws relating to the *immigration* of aliens," and that "he shall establish such rules and regulations and prescribe such forms * * * as he shall deem best calculated for carrying out the provisions of the Act." Pursuant to the authority so conferred the Secretary of Labor and the Commissioner-General established in respect to the procedure to be adopted in the arrest and deportation of aliens the following rule:

"Rule 22. Sub. 2. Application for warrant of arrest.—The application must state facts bringing the alien within one or more of the classes subject to deportation *after entry*. The proof of these facts should be the best that can be obtained. The application must be accompanied by a *certificate of landing* (to be obtained from the immigration officer in charge at the port *where landing occurred*) or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained."

We submit, as found by the Court below, that the officials named construed the words of Section 3 of the Act of 1907, as amended, "*after such alien shall have entered the United States*," as meaning an actual entry or landing in the United States, and

that subdivision 2 of Rule 22, quoted above, in providing for an application by immigration officers for authority to arrest an alien suspected of being unlawfully in the United States, and in requiring that the application should be accompanied by a certificate of landing, referred to nothing less than an actual landing in the United States. The Court below held that the above construction of the statute and rule is rendered "still more positive" (Tr., p. 50) by the certificate of landing required by the rule to accompany the application. (A copy of such certificate of landing is attached to this brief, marked Exhibit "A," and made a part hereof.)

The rule and form of certificate show that the fact that an alien, whose deportation is sought, has landed at some port of entry, or has at some time come in at some place into the United States as an *immigrant*, is a fact, proof of which must be made, before proceedings can be taken for his arrest and deportation. The certificate calls for detailed particulars as to the country from which the alien emigrated; the date and port of his arrival in the United States; his method of transportation thereto—the name of the vessel and line by which he came; his destination—where he expected to make his new home; whether he was ever in the United States before, and whether he was inspected at time of arrival. The exactness and nature of the information called for in the certificate shows beyond all doubt that the executive officers who framed it construed the Act which they were enforcing as applying only to an alien who was or at some time or other had been an immigrant,

and who actually and physically moved from a foreign country to the United States.

The construction thus put upon the statute by the executive officers is entitled to great consideration.

“The best exposition of a statute is that which it has received from contemporary authority. Such is entitled to great weight.”

“Of great dignity is the practical construction put upon an act by the governmental officers particularly charged with its execution.”

Endlich, Interpretation of Statutes, Secs. 357-360.

The words “enter” and “landing” have not, in matters of immigration, acquired any technical meaning, but are used in their ordinary, primary and usual meaning; to *enter* the United States means to make a way into, go or come into the United States.

“The word ‘immigration’ means to immigrate, to come into a country of which one is not a native.”

22 Atty. Gen. Op. 353.

We claim that the words “enter,” “entry,” and “landing” were used by Congress and the executive officers in their ordinary and usual significance, and we are at a loss to understand the Government’s contention that the Court below “has given the said rules a wrong interpretation and a prominence uncalled for.” (Brief, page 4.)

AUTHORITY OF CONGRESS OVER ALIENS.

The authority of Congress over aliens rests on either or both of two grounds:

(1) The principle that every sovereign nation has the power as inherent in sovereignty and essential

to self-preservation to not only forbid the entrance of foreigners but also to expel and deport them, and that that power is vested in Congress;

(2) The power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, the coming and bringing of persons into the ports of the United States.

The first principle above enunciated was declared in *Fong Yue Ting vs. U. S.*, 149 U. S. 697, when the constitutionality of the Act of Congress of 1892, requiring certificates of residence from Chinese and providing for the deportation of those not having such, was passed upon. While admitting the general principle three of the Justices of the Supreme Court dissented in very able opinions from the proposition that the power to deport was vested in Congress and could be delegated by it to executive officers, and from one of the latest decisions of that Court—*Tiaco vs. Forbes*, 228 U. S. 549, decided in May, 1913—it would appear as if the power of Congress to exercise this sovereign right is not accepted without reserve.

Holmes, J.: "It is admitted that sovereign states have inherent power to deport aliens, and *seemingly* that Congress is not deprived of this power by the Constitution of the United States."

The Act of 1907 is not, however, a Deportation Act, but is an Immigration Act.

On the other hand, the authority of Congress to exclude aliens under the commerce clause and to exclude those who after admission and entry are found

to be unlawfully in the country, is well established by a long line of cases beginning with *Chae Chan Ping vs. U. S.*, 130 U. S. 581. The constitutionality of the Acts of Immigration under which Congress not only regulates the admission of aliens but prescribes conditions upon which those who have sought and obtained admission may remain in the country has been uniformly upheld. See

Japanese Immigrants' Case, 189 U. S. 86.

"That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law * * * are principles well established by the decisions of this Court."

The terms and conditions upon which aliens after admission may remain in the country have been made by successive sessions of Congress more drastic and severe. The conditions were imposed in order to enable the officials to determine the fitness of the aliens admitted.

Frick vs. Lewis, 195 Fed. 693, 699.

When the *Japanese Immigrants'* case was decided the period within which an alien might be deported was one year. The statute under review in the case of *Keller vs. U. S.*, 213 U. S. 138, made the limitation three years. In that case Holmes, J., said:

"For the purpose of excluding those who *unlawfully enter* this country Congress has

power to retain control over aliens long enough to make sure of the facts'';

and intimated that in his opinion the three year period was too long, but that he was not prepared to say so against the judgment of Congress.

Whatever the power of Congress may be in respect to aliens, the only power it exercised in the Immigration Acts was in respect to such aliens who had actually entered and landed in the United States, and over whose actions and conduct, no matter at what time they had entered and landed, it determined to retain control. The control of conduct of aliens who had at any time entered the United States within the meaning of the Immigration Act (and that meaning is such as the ordinary significance of the language used conveys), was the purpose and object of Congress in passing those acts, and while up to the time of the amendment of 1910, such control was limited to a period of three years after entry, whether an original entry or re-entry, by such amendment the limitation of the period of control was eliminated, but the prerequisite to the exercise of such control, namely, entrance into the United States, was retained. That the various Immigration Acts have reference solely to aliens who were immigrants and who made an actual landing and entry in the United States, and that the purpose of Congress was to retain control of such persons only as were alien immigrants, see

Japanese Immigrants Case, 189 U. S. 86;

Lapina vs. Williams, 232 U. S. 78;

Lewis vs. Brick, 233 U. S. 291;

Low Wah Suey vs. Backus, 225 U. S. 460;
 Keller vs. U. S., 213 U. S. 138;
 Zakonaite vs. Wolf, 226 U. S. 272;
 Bugajewitz vs. Adams, 228 U. S. 584;
 Bouve, Exclusion and Expulsion of Aliens,
 page 150, and
 Report of the Immigration Commission, 1910.

All of the cases cited above recognize that the Act of 1907 and the earlier Acts of like nature were strictly Immigration Acts dealing with persons who had made an actual entry and landing in the United States.

Bouve, in his work above cited, after enumerating several other classes of aliens subject to the operation of the Act of 1907, as amended by the Act of 1910, covering persons excluded absolutely because of physical or moral disability and those who suffering from some physical disability are admitted conditionally, classifies the rest as follows:

“Those who after having been permitted to enter, shall within three years after the date of such entry become public charges from causes which existed prior to such landing, those who shall within that period have been found by the Secretary of Commerce and Labor to be unlawfully here, all those who, being within the United States may at any time *after entry* and for certain specified causes be deemed to be unlawfully in the United States.”

In support of our contention reference is also made to the titles of the various Acts covering this

subject, a list of which in chronological order appears in the margin of the report of the case of *Lapina vs. Williams, supra*. Such reference is always admitted as throwing light upon the purpose or objects of legislation in case of any doubt arising as to its construction.

The appellees did not *enter* the United States within the meaning of the Immigration Acts.

On July 7, 1898, Congress passed a joint resolution whereby the Hawaiian Islands were annexed as a part of the territory of the United States, and became subject to the dominion thereof, although the actual and formal cession of the sovereignty was not made until August 12, 1899. When this cession was made the Government of the Hawaiian Islands was a republic, and at that time the appellees had been for many years resident aliens in the Islands. They held certain rights as domiciled residents of Hawaii, and with those rights the United States, at the time of annexation, did not attempt to interfere. They were left unmolested in the enjoyment of such rights. By the cession they came as an integral part of the people of Hawaii under the dominion of the United States. They were absorbed by the United States by a process which can in no sense of the word be called "immigration" and by no act of theirs which could come within any definition of the word "enter." The process of absorption was purely involuntary on their part. They did nothing. They remained where they were, and the land in which they were

resident became by operation of the cession of sovereignty a part of the United States.

The appellees do not claim that Congress intended to grant some aliens greater rights than others, or to give aliens in the Hawaiian Islands the right to engage in prostitution and at the same time deny aliens on the mainland that privilege. In fact, they do not claim that the practice of prostitution is either a *right* or a *privilege*. What they do claim is that Congress has expressed its will as to aliens who have entered the United States within the meaning of the Immigration Acts, that it is silent as to others, and that as the appellees never so entered, the provisions of section 3 of the Act of 1907, as amended by Section 2 of the Act of 1910, are not applicable to them.

II.

The Government's second contention is that by the provisions of Section 3 of the Act of 1907, as amended, the idea of an entry or a landing is eliminated except as to aliens practicing prostitution. (Brief, pages 6 and 7.)

This contention is, we submit, unsound for at least two reasons:

(1) The words of the section "after such alien shall have entered the United States" follow the words "any alien who shall be found (1), an *inmate of*, or (2) *connected with the management of a house of prostitution* or (3) *practicing prostitution*." Hence, these words, "after such alien shall have entered the United States," must and do apply with equal force to persons found inmates of, to persons

connected with the management of a house of prostitution, as to persons practicing prostitution. No reading of the statute can possibly make these words applicable solely to aliens practicing prostitution. The Congress of the United States made this clear in the amendments to the Act of 1907 by expressly changing the opening words of the paragraph in the Act of 1907, "Any woman or girl," and the later words, "after *she* shall have entered the United States," to read in the Act of 1910, "Any alien * * * after such alien shall have entered the United States."

(2) Congress, while eliminating the time limit within which it might control aliens, expressly retained the idea of entry or landing. If it had intended to extend the scope of the Act beyond the field of immigration instead of amending the clause in the Act of 1907, by striking out the time limit merely and changing the phraseology of the clause, it could and would easily have stricken the whole clause. It read, in the Act of 1907, "at any time within three years after *she* shall have entered the United States," whereas in the Act of 1910, the time clause was stricken out, the word "she" eliminated, and the clause was made to read, "after such alien shall have entered the United States." These changes show that a clause covering entry was in the mind of Congress, and was intentionally retained by it in the Act.

It may be that Congress did not have in mind the case which has now arisen, but the applicability of

the statute in any case must be decided by the language which Congress used.

“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.”

U. S. vs. Goldenberg, 168 U. S. 95, 152.

The language of the statute undoubtedly presumes an actual landing and entry by an alien over whose conduct it assumes to exercise control. In the section in which the words, “after such alien shall have entered the United States,” occur, Congress amplified and enlarged the class of offenders in any way connected with the evil of prostitution, and the words following the words above quoted were intended, we submit, to show that the design of Congress was to make more definite and certain those against whom its legislation was directed. For instance, while the words “inmate of” and “connected with the management of a house of prostitution” would ordinarily be held to include persons employed in or residing in the house, or those managing the house and deriving benefit therefrom, Congress, so that no judicial fineness of distinction might be indulged in, cleared the ground by specifically mentioning those deriving benefit from the earnings of prostitutes or those employed in, by, or in connection with any house of prostitution or other resort where prostitutes are wont to gather. Congress had in mind mainly the

elimination of the time limit and the retention of the requisite of entry, and was not evidently concerned over the grammatical phraseology of the clause. Its meaning, we contend, was that "any alien who, after such alien shall have entered the United States," may do any of the prescribed acts shall be liable to deportation, and not that an alien connected with the management of a house of prostitution must first have *entered*, while one who was employed in connection with a house of prostitution need not have entered. Such a construction, we claim, would be absurd on its face.

Law On Bew vs. U. S., 144 U. S. 47.

We agree with the Government in the contention that the Immigration Act applies alike to all aliens, if it is understood that by "all aliens" is meant all aliens who have entered. Without this qualification the Act does not apply to all aliens, and a single illustration will suffice to show this. By the Act of March 2, 1907, Chap. 2534, 34 Stat. at L. 1228, an American woman, marrying an alien, becomes an alien. In the case of such a woman who had spent all her life in the United States and who was guilty of any of the acts referred to in Section 3 of the Immigration Act, which would render an alien immigrant liable to deportation, the Act would not be applicable for the reason that deportation could not be enforced. This illustration, we submit, shows clearly that Congress did not make the statute applicable to all aliens, but solely to aliens who have entered the United States at some time, probably having this and similar exceptions in mind.

In conclusion, the appellees submit that their contentions should be sustained, the decision of the Court below affirmed, and the appeals dismissed.

Respectfully submitted,

E. A. MOTT-SMITH,

W. L. STANLEY,

STANLEY & WILDER,

Attorneys for Appellees.

EXHIBIT "A."

"Form 564.

Certificate as to Landing of Alien.

(To accompany application for warrant of arrest.)

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service.

_____, 190—.

I hereby certify that I have examined the records of the immigrant station at _____ with reference to the record of the landing or entry of _____, an alien, and that the following facts relative to such landing or entry are disclosed by said records.

(1) Name of alien, _____; age, _____; sex, _____.

(2) Race, _____; country whence alien came, _____.

(3) Exact date and port of arrival in the United States, _____.

(4) Name of vessel and line, _____.
(If alien arrived *via* Canada or Mexico, so state.)

(5) Destination, _____.

(6) Occupation, _____; money brought, \$_____.

(7) By whom passage paid, _____.

(8) Whether ever in United States before, _____.

(9) Whether inspected at time of arrival, _____.
(If held for special inquiry, so state.)

Remarks: _____

(Signature)_____.

(Official title)_____."

United States
Circuit Court of Appeals
For the Ninth Circuit

NO. 2800

UNITED STATES OF AMERICA,
Appellant.

vs.

CHING LUM,

Appellee.

PETITION FOR REHEARING

E. A. MOTT-SMITH,
W. L. STANLEY,
Counsel for Appellee.

Filed

MAR 2 - 1917

F. D. Monckton,
Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

NO. 2800

UNITED STATES OF AMERICA,	}
Appellant,	
vs.	
CHING LUM,	Appellee.

PETITION FOR REHEARING.

The appellee respectfully petitions that a rehearing be granted for the following reasons:—

1. That the court erred in its Opinion filed herein on the 5th day of February, 1917, and the said Opinion was based upon a misconception of the undisputed facts appearing in the record herein, in so far as it remanded the above cause to the District Court of the United States in and for the Territory of Hawaii with instructions to remand the appellee *for deportation*, because it appears from the said record that the said cause came to this court on appeal from the judgment of the said District Court sustaining the appellee's demurrer to the return of the appellant to the appellee's petition for a writ of habeas corpus, which writ was issued upon the arrest

No. 2801

See 2800

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

WONG YUEN,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

Filed

JAN 29 1916

F. D. MONTGOMERY,
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
WONG YUEN,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Petitioner, WONG YUEN :

THOMPSON, MILVERTON & CATHCART,
Campbell Block, Merchant corner Fort
Streets, Honolulu, Hawaii.

E. A. MOTT-SMITH, Esq., Bank of Hawaii
Bldg., Honolulu, Hawaii.

W. L. STANLEY, Esq., #313 Kauikeolani
Bldg., Honolulu, Hawaii.

For Respondent, RICHARD L. HALSEY, Esq.,
United States Immigration Inspector in
Charge at the Port of Honolulu.

S. C. HUBER, Esq., United States District At-
torney, Honolulu, Hawaii. [1*]

*In the United States District Court in and for the
District and Territory of Hawaii.*

No. 74.

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

Order Extending Time to April 2, 1916, to Transmit Record on Appeal.

Now on this 16th day of March, A. D. 1916, it ap-
pearing from the representations of the clerk of this
court, that it is impracticable for said clerk to pre-
pare and transmit to the clerk of the Ninth Circuit
Court of Appeals, at San Francisco, California, the
transcript of the record on assignment of error in the
above-entitled cause, within the time limited there-
for by the citation heretofore issued in this cause, it

*Page-number appearing at foot of page of original certified Record.

is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to April 15th, 1916.

Dated, Honolulu, T. H., March 16th, 1916.

CHAS. F. CLEMONS,

Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 16th day of March, A. D. 1916.

THOMPSON, MILVERTON & CATHCART.

C. S. F.

[Endorsed]: 74. In the U. S. District Court, Territory of Hawaii. In the Matter of the Application of Woung Yuen for a Writ of Habeas Corpus. Order Extending Time. Filed Mar. 16, 1916. Geo. R. Clark, Clerk. By Wm. L. Rosa, Deputy Clerk.
[2]

*In the United States District Court in and for the
District and Territory of Hawaii.*

No. 74.

In the Matter of the Application of WONG YUEN,
for a Writ of Habeas Corpus.

**Order Extending Time to May 15, 1916, to Transmit
Record on Appeal.**

Now on this 15th day of April, A. D. 1916, it ap-

pearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to May 15, 1916.

Dated, Honolulu, T. H., April 15, 1916.

CHAS. F. CLEMONS,
Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 15th day of April, A. D. 1916.

THOMPSON, MILVERTON & CATHCART.
C. S. F.

[Endorsed]: #74. In the United States District Court, for the Territory of Hawaii. In the Matter of the Application of Wong Yuen for a Writ of Habeas Corpus. Order Extending Time to Transmit Record on Appeal. Filed Apr. 15, 1916. George R. Clark, Clerk. By Wm. L. Rosa, Deputy Clerk.
[3]

*In the United States District Court in and for the
District and Territory of Hawaii.*

No. 74.

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

**Order Extending Time to June 15, 1916, to Transmit
Record on Appeal.**

Now, on this 15th day of May, A. D. 1916, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to June 15, 1916.

Dated Honolulu, T. H., May 15th, 1916.

CHAS. F. CLEMONS,

Judge, U. S. District Court.

Due service of the above order, and receipt of a

copy thereof are hereby admitted this 15th day of May, A. D. 1916.

S. C. HUBER,
U. S. Attorney.

THOMPSON, MILVERTON & CATHCART.

C. S. F.

[Endorsed]: #74. United States District Court, Territory of Hawaii. In the Matter of the Application of Wong Yuen for a Writ of Habeas Corpus. Filed May 15, 1916. George R. Clark, Clerk. By Ray B. Rietow, Deputy Clerk. [4]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 74.

In the Matter of the Petition of WONG YUEN for
a Writ of Habeas Corpus.

Statement of Clerk.

TIME OF COMMENCEMENT OF SUIT.

October 18, 1913: Verified petition for writ of habeas corpus, order for issuance of writ of habeas corpus, writ of habeas corpus and marshal's return thereon.

NAMES OF ORIGINAL PARTIES.

Petitioner: Wong Yuen.

Respondent: Richard L. Halsey, Esq., United States Inspector of Immigration in Charge at the Port of Honolulu.

DATES OF FILING OF THE PLEADINGS.

October 18, 1913: Petition.

October 22, 1913: Demurrer to petition.

October 28, 1913: Return of Richard L. Halsey to the writ of habeas corpus.

December 1, 1913: Demurrer to return of Richard L. Halsey to the writ of habeas corpus.

SERVICE OF PROCESS.

October 18, 1913: Writ issued and delivered to the United States marshal for the District of Hawaii. Said writ was afterwards returned into court with the following return by the said United States marshal: "The within petition, order and writ of habeas corpus were received by me on the 18th [5] day of October, A. D. 1913, at 8:15 P. M., and in obedience thereto I have served the same upon Richard L. Halsey, United States Immigration Inspector-in-Charge at the Port of Honolulu, in Honolulu, on the 18th day of October, A. D. 1913, and upon C. C. Bitting, Assistant United States District Attorney, in Honolulu, on the 20th day of October, A. D. 1913, by handing to and leaving with each of them a certified copy of the within petition, order and writ of habeas corpus, and in further obedience thereto I hereby produce the body of the within-named Wong Yuen forthwith before this Court. The within writ returned this 20th day of October, A. D. 1913. (Sgd.) E. R. Hendry, United States Marshal. Dated, Honolulu, T. H., October 18, 1913."

HEARINGS.

October 23, 1913: Proceedings at hearing on demurrer to petition and continuance to October 24, 1913, for decision.

October 25, 1913: Proceedings at decision overruling demurrer to petition.

December 1, 1913: Proceedings at hearing on demurrer to return and order in re briefs.

March 16, 1914: Proceedings at hearing, order taking cause under advisement and ordering briefs filed. [6]

May 28, 1915: Proceedings at argument and order in re briefs.

August 2, 1915: Proceedings at decision sustaining demurrer to respondent's return and order continuing cause to August 3, 1915, to contest petitioner's allegations of residence in Hawaii.

August 4, 1915: Proceedings at supplementary decision discharging applicant under writ.

The above hearings were had before the Honorable SANFORD B. DOLE, Judge of said Court.

DECISIONS.

October 25, 1913: Decision overruling respondent's demurrer to petition.

August 2, 1915: Decision sustaining demurrer to respondent's return.

August 4, 1915: Supplementary decision discharging applicant under writ.

December 16, 1915: Judgment filed and entered (Dole, J.),

PETITION FOR APPEAL.

February 15, 1916: Petition for appeal and order allowing same filed.

United States of America,

Territory of Hawaii,—ss.

I, George R. Clark, Clerk of the United States

Wong Yuen, and his next friend, on his behalf and by his authority, for the reason that he, the said Wong Yuen is incarcerated and now is in the custody of R. L. Halsey, Inspector-in-Charge of Immigration for the United States in and for the District and Territory of Hawaii, and that he is unlawfully held by the said R. L. Halsey, and because he is so held by the said R. L. Halsey, is unable to sign this petition in his own behalf.

2d. Your petitioner further says that the said Wong Yuen is a citizen of the Republic of China; that for more than 20 years last past he has been a resident of the city and county of Honolulu, Territory of Hawaii; that he, said Wong Yuen, is a resident property holder, holding property in the said Territory of Hawaii in the sum of \$2,000 and over; that he is a merchant and is engaged in a general merchandise business conducted by the Yee Sun Kee Store, of which he is the manager, and which is situated in the said city and county of Honolulu.

3d. That said Wong Yuen has not absented himself from the said territory for a period of more than ten years last [8] past, and your petitioner further alleges that said Wong Yuen is now confined in the United States Immigration Station in said city and county of Honolulu, Territory of Hawaii, and unlawfully restrained from his liberty and prevented from being enlarged by the said R. L. Halsey, Inspector-in-Charge of Immigration as aforesaid.

4th. That said Wong Yuen is not an undesirable immigrant within the meaning of the laws of the Territory of Hawaii.

5th. That your petitioner, acting for and on behalf of said Wong Yuen, and on his authority did, on the 18th day of October, A. D. 1913, make application to the said R. L. Halsey to have said Wong Yuen enlarged upon bail; and then and there tendered good and sufficient securities for a bond of such amount as said R. L. Halsey might require. That said R. L. Halsey then and there declined to enlarge the said Wong Yuen upon any bond, and stated that he was being held for investigation by the immigration authorities of the United States in and for the Territory of Hawaii.

6th. That the said Wong Yuen is not now and has not been charged with the commission of any crime or offense against the laws of the United States relating to immigration.

7th. Your petitioner further says that upon his application to have the said Wong Yuen enlarged upon bond, said R. L. Halsey stated to him that said Wong Yuen would at his, said Halsey's convenience, be permitted a hearing, but he declined to say at what time said hearing would be held.

8th. Your petitioner further says that thereafter application was made to said R. L. Halsey for permission to allow the said Wong Yuen to be represented by counsel, but the said R. L. Halsey declined to permit the said Wong Yuen to see or talk with counsel, and declined to have counsel represent him.

9th. That all and singular the premises are true and [9] within the jurisdiction of your Honor and this Honorable Court.

WHEREFORE, this petitioner prays that a writ of habeas corpus be issued out of this Honorable Court by your Honor commanding the said R. L. Halsey to have and produce the body of said Wong Yuen before this Honorable Court at such time and place as the Court may direct, and, pending the action hereon, that said Wong Yuen be enlarged upon by such bond as your Honor may require in the premises.

Dated Honolulu, October 18, 1913.

(Sgd.) CHING SHAI,
His Next Friend,
Petitioner.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Ching Shai, being first duly sworn, deposes and says, that he is the petitioner named in the foregoing petition, being named therein as the next friend of said Wong Yuen; that he has been acquainted with the said Wong Yuen, the person unlawfully detained, for a period of over fifteen years; that during all of said period, they have been intimately associated in social matters and business transactions; that he knows of his own knowledge that the said Wong Yuen is the identical person he represents himself to be, and the person now unlawfully detained by the said R. L. Halsey; that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief; that he makes this application and this verification in good faith and not for the purpose of aiding in the

evasion of any of the laws of the United States, and that the reason why this verification and petition are not made by the said Wong Yuen is for the reason that the said Wong Yuen is unable to communicate with counsel, and because of his detention as aforesaid, is unable to sign and verify the same in person.

[Seal]

(Sgd.) CHING SHAI.

Subscribed and sworn to before me this 18th day of October, 1913.

(Sgd.) BERNICE K. DWIGHT,

Notary Public, First Judicial Circuit, Territory of Hawaii. [10]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

**Order Directing Issuance of Writ of Habeas Corpus,
etc.**

Upon reading the foregoing petition, let a Writ of Habeas Corpus issue as prayed for forthwith and, upon the filing of a bond in the sum of \$1,000, with good and sufficient sureties, let the said Wong Yuen be released to appear before this Court on Monday, October 20th, 1913, at the hour of ten o'clock A. M., and let a copy of this petition, order and writ be served upon the Honorable R. W. Breckons, United States District Attorney, or his Deputy.

Dated Honolulu, this 18th day of October, A. D. 1913.

(Sgd.) S. B. DOLE,
United States District Judge of the District Court
of the United States in and for the District of
Hawaii. [11]

Writ of Habeas Corpus.

The President of the United States of America, to
R. L. HALSEY, inspector-in-Charge of Immi-
gration in and for the District and Territory of
Hawaii:

We strictly command and enjoin you that you
have and produce before the United States District
Court, in and for the District and Territory of
Hawaii forthwith, the body of Wong Yuen, and that
you do on the 20th day of October, A. D. 1913, at
the hour of ten o'clock A. M., in the courtroom of
said court at Honolulu, disclose the cause of his im-
prisonment and detention and then and there re-
ceive, undergo and have what the said United States
District Court shall consider right, and in accord-
ance with the law of the land, concerning him, the
said Wong Yuen, and to abide the judgment of the
Court in this behalf.

And we do hereby further command the United
States Marshal in and for the District and Territory
of Hawaii to serve this Writ of Habeas Corpus upon
the said R. L. Halsey, and make due return hereof,
together with this Writ.

Hereof fail not at your peril.

WITNESS the Honorable SANFORD B. DOLE,
Judge of the United States District Court, in and

for the District and Territory of Hawaii, this 18th day of October, A. D. 1913.

By the United States District Court.

[Seal]

A. E. MURPHY,

Clerk of the Above-entitled Court.

By (Sgd.) F. L. DAVIS,

Deputy Clerk. [12]

MARSHAL'S RETURN.

United States Marshal's Office.

The within petition, order and writ of habeas corpus were received by me on the 18th day of October, A. D. 1913, at 8:15 P. M., and in obedience thereto I have served the same upon Richard L. Halsey, United States Immigration Inspector-in-Charge at the Port of Honolulu, in Honolulu, on the 18th day of October, A. D. 1913, and upon C. C. Bitting, Assistant United States District Attorney, in Honolulu, on the 20th day of October, A. D. 1913, by handing to and leaving with each of them a certified copy of the within petition, order and writ of habeas corpus, and in further obedience thereto I hereby produce the body of the within-named Wong Yuen forthwith before this Court. The within writ returned this 20th day of October, A. D. 1913.

(Sgd.) E. R. HENDRY,

United States Marshal.

Dated, Honolulu, T. H., October 18, 1913.

[Endorsed]: No. 74. (Title of Court and Cause.)
Petition for Writ, Order and Writ. Filed Oct. 18,
1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis,
Deputy Clerk. [13]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

Bond for Appearance.

KNOW ALL MEN BY THESE PRESENTS, that we, Hong Quon and Wong Chee, both residents of the city and county of Honolulu, Territory of Hawaii, are held and firmly bound unto E. R. Hendry, United States Marshal in and for the District and Territory of Hawaii, in the penal sum of \$1,000, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated the 18th day of October, A. D. 1913.

The condition of this obligation is such that if Wong Yuen, now detained by R. L. Halsey, Inspector-in-charge of Immigration, in and for the Territory of Hawaii, and sought to be enlarged upon by a Writ of Habeas Corpus, shall appear before the United States District Court, in and for the District and Territory of Hawaii, on the 20th day of October, at the hour of 10 o'clock A. M., as by order of Court filed herewith, he is required to do, and shall thereafter appear before said Court at such time as it may direct, then this obligation to be void, otherwise to remain in full force and effect.

(Sgd.) HONG QUON.

(Sgd.) WONG CHEE.

The foregoing bond is approved as to form, amount and sureties.

(Sgd.) S. B. DOLE,
Judge Above-entitled Court.

[Endorsed]: No. 74. (Title of Court and Cause.)
Bond. Filed Oct. 18, 1913. A. E. Murphy, Clerk.
By (Sgd.) F. L. Davis, Deputy Clerk. [14]

Order Continuing Hearing to October 22, 1913.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court, Monday, October 20, 1913, Vol. 8, page
654.

(Title of Court and Cause.)

On this day came Mr. E. M. Watson of the firm of Thompson, Wilder, Watson & Lymer, counsel for the above petitioner and also came Mr. C. C. Bitting, Assistant United States Attorney on behalf of the respondent herein, Richard L. Halsey, and this cause was called for hearing on return. Thereupon on motion of Mr. Bitting and consent of Mr. Watson it was by the Court ordered that this cause be continued to October 22, 1913, at 10 o'clock A. M., for hearing on said return. [15]

Order Continuing Hearing to October 23, 1913.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Wednesday, October 22, 1913, Vol. 8, page 658.

(Title of Court and Cause.)

The within cause having been called on this day for hearing on return to the writ herein and none of counsel for the respective parties being present, it was by the Court ordered that this cause be continued to October 23, 1913, at 10 o'clock A. M., for hearing on said return. [16]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of WONG YUEN for a Writ of Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now Richard L. Halsey, the respondent named in the petition herein, and demurs to the petition herein filed, and for grounds of his demurrer says:

First. That the said petition and application for the writ of habeas corpus does not set forth the facts concerning the detention of the party alleged to be restrained.

Second. That the said petition does not set forth by virtue of what claim or authority the petitioner is detained.

Third. That said petition does not state, nor in any manner show that the petitioner does not know by virtue of what claim or authority the said Wong Yuen is detained.

WHEREFORE, your respondent prays that the said petition may be dismissed, and the writ and order thereupon issued may be discharged, and the petitioner remanded to the custody whence he came.

RICHARD L. HALSEY,
Inspector-in-Charge.

By (Sgd.) C. C. BITTING,
Assistant U. S. Attorney.

Dated this 22d day of October, A. D. 1913. [17]

[Endorsed]: No. 74. (Title of Court and Cause.)
Demurrer to Petition. Filed Oct. 22, 1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [18]

**Order of Submission of Demurrer to Petition for
Writ of Habeas Corpus.**

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court, Thursday, October 23, 1913, Vol. 8, page
659.

(Title of Court and Cause.)

On this day came the above petitioner in person and with Messrs. F. E. Thompson, A. A. Wilder and B. S. Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, counsel for said petitioner, and also came Mr. Richard L. Halsey, the respondent herein, in person and with Mr. C. C. Bitting, Assistant

United States Attorney, and this cause was called for hearing on the return of the respondent herein. Thereupon Mr. Bitting filed respondent's demurrer to the petition herein and due argument having been had thereon by respective counsel, it was by the Court ordered that this cause be continued to October 24, 1913, at 10 o'clock A. M., for decision on said demurrer. [19]

Order Continuing Cause to October 25, 1913, for Decision on Demurrer, to Petition for Writ of Habeas Corpus.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Friday, October 24, 1913. Vol. 8, Page 661.

(Title of Court and Cause.)

On this day came the above petitioner, in person and with his counsel, Messrs. A. A. Wilder and B. S. Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, and also came the respondent, Richard L. Halsey, in person and with Mr. C. C. Bitting, Assistant United States Attorney, and this cause was called for decision on demurrer to the petition herein. Thereupon it was by the Court ordered that this cause be continued to October 25, 1913, at 10 o'clock A. M., for decision on said demurrer. [20]

**Order Overruling Demurrer to Petition for Writ of
Habeas Corpus, etc.**

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court, Saturday, October 25, 1913. Vol. 8, Page
663.

(Title of Court and Cause.)

On this day came the above petitioner, in person and with his counsel, Mr. A. A. Wilder and B. S. Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, and also came Mr. Richard L. Halsey, the respondent herein, in person and with Mr. C. C. Bitting, Assistant United States Attorney, and this cause was called for decision on demurrer to the petition herein. Thereupon the Court read its decision overruling the said demurrer and allowing the respondent until October 28, 1913, within which to file a return to the writ herein. [21]

*In the United States District Court for the Territory
of Hawaii.*

October, A. D. 1913 Term.

No. 73.

In the Matter of the Application of CHUNG LUM
for a Writ of Habeas Corpus.

No. 74.

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

No. 75.

In the Matter of the Application of SUI JOY for a
Writ of Habeas Corpus.

Opinion on Demurrer to Petition for Writ of Habeas Corpus.

October 25, 1913.

Habeas corpus—Delay of writ until remedies below exhausted: On a petition for habeas corpus the Court will not usually grant the writ, except under peculiar and urgent circumstances, until the petitioner has exhausted his remedies before the authority detaining him and on appeal therefrom.

Immigration acts—Detention of persons charged with violation thereof: Temporary detention of persons charged with offenses under the immigration acts, pending inquiry, is valid.

Arrest—Probable cause: Arrest of persons without probable cause, unauthorized. [22]

Same—Grounds: Upon arrest of a person, he or his counsel should be informed of the grounds thereof.

Habeas Corpus: Demurrer to Petition.

THOMPSON, WILDER, WATSON & LYMER,
for Petitioners.

C. C. BITTING, Assistant U. S. District At-
torney, for Respondent.

The petitions in these cases claim that the persons in whose behalf the petitions are made are unlawfully restrained of their liberty and prevented from being at large by R. L. Halsey, inspector-in-charge of immigration; also that the said Halsey had stated that such persons were being held for investigation

by the immigration authorities of the United States in and for the Territory of Hawaii, and further allege that such persons are not now and have "not been charged with the commission of any crime or offense against the laws of the United States relating to immigration."

The precedents in habeas corpus cases in the United States courts, particularly in the supreme court, emphasize and reiterate the practice that although a federal court with power to grant a writ of habeas corpus, may grant such writ and discharge the accused in advance of his trial under an indictment, it is not bound to exercise that power immediately upon the application being made for the writ, but may await the result of the trial, and in its discretion as the special [23] circumstances of the case may require, put the petitioner to his writ of error from the highest court of the State. *Ex parte Terry*, 128 U. S. 289, 302.

In the case of *Whitten v. Tomlinson*, 160 U. S. 231, 242, and citing many cases in the supreme court, the Court says:

"But, except in such peculiar and urgent cases (previously mentioned) the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court."

The Court has followed this practice and in the recent case of Ryonosuke Sakaba dismissed the petition for a writ on the ground that the applicant had not exhausted the remedies before the immigration officers, and still more recently the Court refused to make any order on the petition for the writ, because the usual proceedings before the immigration officers had not taken place. This practice is, I think, a reasonable one both for clients and the Court. It will tend to prevent cases from being brought which ought not to be brought, and to put the Court in a position to try to hear petitions where the remedies below have been exhausted, on the basis of a clear understanding. [24]

It is "clear that detention, of temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation."

Accused of what? This expression "those accused," in the citation from *Wong Wing vs. United States*, 163 U. S. 228, 235, implies that the person held in custody is accused of something. In other words, has been arrested, in the words of the Constitution, "upon probable cause."

For the purposes of this demurrer the allegations that the persons arrested are not now and have not been charged with the commission of any crime or offense against the United States relating to immi-

gration, must be taken as true. It cannot be argued that they might have been arrested for some other offense not relating to immigration, inasmuch as a previous allegation which must also be admitted to be true, refers to the statement of the respondent that such persons were being held for "investigation by the immigration authorities of the United States in and for the Territory of Hawaii," thus limiting the possible grounds of arrest to offenses under the immigration laws. [25]

I know of no provision in the federal law authorizing the arrest of anyone without probable cause merely for purpose of investigation.

If the immigration officers had informed counsel for the prisoners upon what charge they were detained, in case a charge had been made against them, such facts would have been stated in the petitions for the writs and the Court would then have ascertained that the prisoners were not unlawfully deprived of their liberty, and upon such information would have been in a position to have denied the writs, leaving the prisoners to the proceedings provided by law for an investigation and treatment of such offenses as were within the jurisdiction of the Secretary of Labor and his agents.

As the cases stand, however, on the petitions and the demurrers, the Court feels compelled to overrule the demurrers and leave the respondent to state his authority and the grounds of making the arrests complained of in his return.

(Sgd.) SANFORD B. DOLE,
Judge, United States District Court.

[Endorsed]: No. 74. (Title of Court and Cause.)
Decision of Dole, J., on Demurrer to Petition. Filed
Saturday, Oct. 25, 1913. A. E. Murphy, Clerk. By
(Sgd.) Wm. L. Rosa, Deputy Clerk. [26]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

**Return of Richard L. Halsey, Inspector-in-Charge
of Immigration at the Port of Honolulu, to the
Writ of Habeas Corpus Heretofore in this Cause
Issued.**

Comes now Richard L. Halsey, respondent above
named, and by way of return to the writ of habeas
corpus herein issued, respectfully shows:

First. That he is unable at this time, and has
been unable since the service of the writ of habeas
corpus upon himself, to produce the body of the said
Wong Yuen, as by said writ ordered, because that
by the order of this Court, improvidently issued, as
respondent says, the said Wong Yuen had been and
has been removed from his custody.

Second. That the writ herein issued, and the
order for enlargement upon bail, was ordered by the
Court without previous notice, as required by rule,
having been given to the United States Attorney,
or to the Assistant United States Attorney; [27]
and by reason thereof respondent had no oppor-
tunity to call the attention of the same to the said
United States Attorney, or the said Assistant United

States Attorney, nor was he apprised himself until said writ and order for enlargement upon bail had been served upon him.

Third. That upon the 18th day of October, A. D. 1913, the petitioner was arrested under and by virtue of a warrant from the Acting Secretary of Labor, directed to respondent, requiring him to arrest and bring before himself for hearing, the said petitioner, upon the charge of being found receiving, sharing in, or deriving benefit from a part or the whole of the earnings of a prostitute; a copy of which is hereto attached and made a part hereof; that about eleven o'clock A. M. on said 18th day of October, A. D. 1913, one Ching Shai, who verifies the petition for the writ of habeas corpus in this cause, and who signed the same as next friend for the petitioner, appeared at the office of the respondent, with other Chinese, and stated that he wished to give bond for Ching Lum, Siu Joy and Wong Yuen; that the said Ching Shai was then informed by the respondent that these men had been arrested because they had property rented to prostitutes, and that they received benefits therefrom; that they would be given a hearing on the Monday following, and then would be entitled to have counsel at further hearings, and would be released upon satisfactory bond, and that if possible the bond would be given on Monday afternoon or Tuesday. That later in the day of the 18th day of October, 1913, and during the noon hour of said day, a person whom respondent afterwards learned to be Mr. Ulrich, appeared at the office of respondent, and stated that he was from the office

of Thompson, Wilder, Watson and Lymer, [28] and asked to see the said Wong Yuen, Siu Joy and Ching Lum, and asked why they were held; and then he was informed that the said parties were taken into custody for the violation of section 3 of the Immigration Act, and that they were not permitted to have counsel until after a hearing had been given.

Fourth. Respondent admits that the said Wong Yuen is a citizen of the Republic of China, and that he has been for many years last past a resident of the Territory of Hawaii.

Fifth. Answering paragraph five of said petition, respondent says that he did decline to enlarge the said Wong Yuen at the time upon any bond, stating as a reason for said declination, that the petitioner was held for a hearing upon the charge of violation of section 3 of the Immigration Act, and was not entitled to be enlarged upon bail until such further time as in his discretion a hearing could be had and bail be allowed.

Sixth. The respondent denies paragraphs four, five and six of said petition, and says in reply to paragraph eight of said petition, that he specifically informed both the petitioner and the said representative of the firm of Thompson, Wilder, Watson and Lymer, that at such stage of the hearing as the officer before whom the hearing should be held, should deem proper, the petitioner might, if he so desired, be represented by counsel.

Seventh. That the writ of habeas corpus based upon the petition herein, was issued before a reasonable time had elapsed or could elapse, for a hearing,

as provided by law, and that the detention of the petitioner at said time was not unlawful, but on the contrary was lawful and within the rights and duties of [29] the respondent, and was made pursuant to a law of the Congress of the United States of America, and the rules of the Department of Labor based thereon, and the detention so provided for.

Eighth. That said petition does not in any way state the facts, or show whether or not the petitioner was unlawfully held by respondent, nor are any facts stated or pretended to be stated in said petition setting forth or showing that the petitioner was unlawfully restrained of his liberty.

Ninth. That this Court had no jurisdiction over said cause, because said matter, and the subject thereof, was and is left entirely in the hands of the Secretary of Labor by the laws of the United States, in whom alone, at said time, was vested the authority to inquire into the fact as to whether said alien petitioner was subject to arrest and deportation, and because the determination of that fact was vested alone by law in the Secretary of Labor, and that until a hearing should be had, and the full record of such hearing forwarded to the Bureau of Labor, together with any written argument submitted by the counsel for the petitioner, as provided by law, and the rules of the Department, this Court had no jurisdiction.

Tenth. That the issuance of said writ, and order for enlargement upon bail, before said hearing as provided by law, was without the jurisdiction of this Court, and if a pretended hearing of the facts in said matter involved should be attempted to be had by

this Court, it would be an exercise of functions of both the executive and legislative branches of the government of the United States by the judiciary department thereof, and in contravention of the principles of the Constitution of the United States.
[30]

Eleventh. That the respondent denies all further allegations and averments of said petition necessary to be denied, and not herein specifically denied.

Twelfth. That attached to this return, and made a part hereof, are the affidavits of Richard L. Halsey, Harry B. Brown, Manuel Rawlins and Moses Kauwe.

WHEREFORE, respondent prays that the writ may be discharged, the petition dismissed, and the petitioner remanded to the custody whence he came, and that such other and further relief may be had to which respondent may be entitled in the premises; and that petitioner be required to pay the costs herein.

(Sgd.) RICHARD L. HALSEY.

(Sgd.) C. C. BITTING,

Assistant U. S. Attorney.

Dated this 28th day of October, A. D. 1913. [31]

**Cablegram, October 17, 1913, Acting Secretary to
Immigration, Honolulu.**

(Copy of Cablegram.)

"VIA COMMERCIAL PACIFIC"

2.5PM

BDN.

Oct 17 1913

37 USG WASHINGTON DC 25

IMMIGRATION HONOLULU

**ARROW CHING LUM SIU JOY CHUN PIN
WONG YUEN KWANJIRO HARUTA RE-
CEIPTOR HATSUME HARUTA AND TOKU
SAKAI PROGNOSIS**

**LOUIS Y. POST,
ACTING SECRETARY.**

**TRANSLATION: (ARROW) ARREST FOL-
LOWING NAMED ALIEN (S) AND BRING BE-
FORE YOURSELF FOR HEARING, FORWARD-
ING RECORD OF PROCEEDINGS TO THE DE-
PARTMENT.**

**(RECEIPTOR) ALIEN FOUND RECEIVING,
SHARING IN, OR DERIVING BENEFIT FROM
A PART OF THE WHOLE OF THE EARNINGS
OF A PROSTITUTE.**

**(PROGNOSIS) ALIEN FOUND PRACTICING
PROSTITUTION AFTER ENTRY. [32]**

Affidavit of Richard L. Halsey.

**Territory of Hawaii,
City and County of Honolulu,—ss.**

**Richard L. Halsey, being first duly sworn on his
oath, deposes and says:**

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii; that I have been a resident of Honolulu, Territory of Hawaii, since November 13, 1903; that I am Inspector-in-Charge of the United States Immigration Service, District of Hawaii, and have been for more than a year last past; that upon the 18th day of October, 1913, at about 11:00 A. M., Mr. Ching Shai appeared at my office, with other Chinese, and stated that he wished to give bond for Mr. Ching Lum, Siu Joy and Wong Yuen. I informed Mr. Ching Shai that these men had been arrested because they had property rented to prostitutes, and that they received benefits therefrom, which was against the law; that they would be given a hearing on Monday following, and that they would be entitled to have counsel at further hearings, and would be released upon satisfactory bond. That, if possible, the bond would be given on Monday afternoon or Tuesday; that it would be necessary to specify in the bond the property or sureties, clearly designating the same, and as to value, and whether any incumbrances were on same. Later, during the noon hour, a man, who I have since learned was a Mr. Ulrich, appeared at my office and stated that he was from the office of Thompson, Wilder, Watson & Lymer, and asked to see Ching Lum, Siu Joy and Wong Yuen, and asked why they were held. I informed him that they were taken into custody for violation of Section 3 of the Immigration Act, that they were not permitted to have counsel until after a hearing had been given.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 25th day of October, A. D. 1913.

[Seal] (Sgd.) CHAS. L. SEYBOLT,
Notary Public, 1st Judicial Circuit, Territory of
Hawaii. [33]

Affidavit of Harry B. Brown.

Territory of Hawaii,
City and County of Honolulu,—ss.

Harry B. Brown, being first duly sworn on his oath, deposes and says:

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii, and an Immigrant and Acting Chinese Inspector in the United States Immigration Service. That on October 18th, 1913, Richard L. Halsey, Inspector-in-charge, United States Immigration Service for the District of Hawaii, gave me a telegraphic warrant to serve on four Chinese. This warrant charged them with receiving, sharing in, and deriving benefit from the earnings of a prostitute or prostitutes. The names of the Chinese were Ching Lum, Siu Joy, Wong Yuen and Chun Pin. About 10:30 A. M. Mr. Ching Lum was found in the clubrooms at Palama Junction and the warrant was then and there served on him and he was told the charges against him. He said that he did not own the houses at the present but that he had turned them over to his son. I specifically told him that he was charged in the warrant with receiving, sharing in, or deriving benefit from the earning or earnings of a prostitute or prostitutes, as he was the owner of some houses in Iwilei which were used for the purposes of prostitution, and that

his bail would be \$1,000, and that it would be necessary for him to have two sureties, each qualifying double the amount of the bond, and that they must qualify upon real estate. He then asked permission to telephone a friend and, I believe, mentioned the name of Ching Shai. He then went to another room where I suppose he telephoned to this friend, for he was gone three or four minutes and when he returned I asked him if he had gotten his friend and he said that everything was all right. I then left Mr. Manuel Rawlins in charge of Mr. Ching Lum and went downstairs to the Yee Shum Kee store where Mr. Wong Yuen was located and I there served the warrant on him, telling him that he was arrested on the warrant which charged him with receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. Mr. Wong Yuen then got into a hack with Mr. Rawlins and Mr. Ching Lum, and [34] I got into another hack and went to the Market Hardware store, which is near the fish market, where I found Mr. Siu Joy. I told Mr. Siu Joy that he was placed under arrest and charged with receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. I then took Mr. Siu Joy in the hack with me, and, in company with the other hack in which were Mr. Rawlins, Mr. Wong Yuen and Mr. Ching Lum, we proceeded to the U. S. Immigration Station. We arrived there about 11:00 A. M., Oct. 18, 1913. Mr. Ching Shai was waiting in the Immigration office when we arrived. After placing the men in detention Mr. Rawlins and myself went out to look for

the other person named in the telegraphic warrant, Mr. Chun Pin, but he was not found at his residence. We then went to Iwilei in search for Mr. Chun Pin, but we were unable to locate him. We then returned to the Immigration Station. On our return, just opposite the U. S. Naval Station, we met two hacks in which there were Chinese. This a few moments after twelve o'clock noon. Mr. Ching Shai was in one of these hacks, stopped the hack, and spoke to me. Mr. Ching Shai asked about bonds and I told him that Mr. Halsey was in charge of that. Nothing was said to Mr. Ching Shai or any member of his party as to why these Chinese were arrested or why they were detained, nor did Mr. Ching Shai ask for such information. I told Mr. Ching Shai that they would be given a hearing Monday morning, and that bonds would then be arranged. I remember of telling him that it would take some little time to get bonds approved as the inspector-in-charge had to examine into the solvency of the bonds and after that the bonds would have to be approved by the U. S. District Attorney or his assistant as to form and execution; that the bonds would then be returned to the Immigration Office and the people released.

(Sgd.) HARRY B. BROWN.

Subscribed and sworn to before me this 27th day of October, 1913.

[Seal]

(Sgd.) P. H. BURNETTE,

Notary Public in and for the First Judicial Circuit,
Territory of Hawaii. [35]

Affidavit of Manuel Rawlins.

Territory of Hawaii,

City and County of Honolulu,—ss.

Manuel Rawlins, being first duly sworn on his oath, deposes and says:

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii, and an employee in the United States Immigration Service. That on October 18, 1913, I was detailed to accompany Inspector Harry B. Brown to make arrests of certain Chinese. First we went to the residence of Mr. Ching Lum, in a lane off Beretania Street, near Palama Junction. Mr. Ching Lum was not there, and we then went to the clubroom on the third floor of a building at Palama Junction, where we found Mr. Ching Lum. Mr. Brown told him that he was arrested in accordance with a warrant from the Acting Secretary of the Department of Labor, and that he was charged with being the owner of some houses in Iwilei which were used for prostitution, and that he was deriving benefit from such prostitution. Mr. Ching Lum immediately said that he had turned those houses over to his son. Mr. Ching Lum then asked Mr. Brown for the privilege of going to the telephone to see about bondsmen. Previously, Mr. Brown had told Mr. Ching Lum that the bond in the case would be in the sum of \$1,000. Mr. Ching Lum went to the telephone alone and was gone some length of time, probably three or four minutes. When he returned he said he was ready. We then went to a store near to this building, where Mr. Wong Yuen

was taken into custody. He came in the hack with Mr. Ching Lum and myself, while Mr. Brown went in another hack to the hardware store near the fish market, where another Chinese was taken into custody. The entire party then came to the Immigration Station. This was about 11 A. M. After putting the Chinese in detention, Mr. Brown and myself got into a hack and went to Palama, to the residence of Mr. Chun Pin. He was not to be found. We were then returning to the Immigration Station, and when about opposite the Naval Station, a few minutes after 12 noon, we met two hacks with Chinese in them, going toward town; they stopped and spoke to Mr. [36] Brown about getting Ching Lum and the others out on bond. Mr. Brown told them they would have to see Mr. Halsey about getting bonds; they said that they had seen Mr. Halsey, and Mr. Brown told them that nothing could be done until Monday morning, when he would give them a hearing, and then bonds could be arranged for.

(Sgd.) MANUEL RAWLINS.

Subscribed and sworn to before me this 27th day of October, 1913.

[Seal] (Sgd.) P. H. BURNETTE,
Notary Public in and for the First Judicial Circuit,
Territory of Hawaii. [37]

Affidavit of Moses Kauwe.

Territory of Hawaii,
City and County of Honolulu,—ss.

Moses Kauwe, being first duly sworn on his oath, deposes and says:

That I am a citizen of the United States and a resident of Honolulu, Territory of Hawaii, and an employee in the United States Immigration Service. That I was at my desk on the 18th day of October, 1913, and at about eleven o'clock A. M., Mr. Ching Shai, and some other Chinese, came into the office and Mr. Ching Shai stated to Mr. Richard L. Halsey that he wished to give bond for Mr. Ching Lum, Siu Joy, and Wong Yuen, and Mr. Halsey told him that the men had been arrested because they rented houses in Iwilei in which there were prostitutes, and that they derived benefit from renting the houses, and that this was against the law. Mr. Halsey told Mr. Ching Shai that Ching Lum, Siu Joy and Wong Yuen, would be given a hearing the following Monday and explained to him how after that a bond could be made out for their release.

(Sgd.) MOSES KAUWE.

Subscribed and sworn to before me this 25th day of October, 1913.

[Seal] (Sgd.) DAVID L. PETERSON,
Notary Public First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: No. 74. (Title of Court and Cause.)
Return of Richard L. Halsey to Writ of Habeas
Corpus. Filed Oct. 28, 1913. A. E. Murphy, Clerk.
By (Sgd.) Wm. L. Rosa, Deputy Clerk. [38]

Order Continuing Hearing to October 31, 1913.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Thursday, October 30, 1913, Vol. 8, page 674.

(Title of Court and Cause.)

On this day came Mr. A. A. Wilder of the firm of Thompson, Wilder, Watson and Lymer, counsel for the above petitioner, and also came Mr. R. L. Halsey, the respondent herein in person and with Mr. C. C. Bitting, Assistant United States Attorney, and this cause was called for hearing on respondent's return. Thereupon on motion of Mr. Wilder and consent of Mr. Bitting, it was by the Court ordered that this cause be continued to October 31, 1913, at 2 o'clock P. M., for hearing on said return. [39]

Order Continuing Hearing, etc.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Friday, October 31, 1913, Vol. 8, page 675.

(Title of Court and Cause.)

On this day came Mr. C. C. Bitting, Assistant United States Attorney, on behalf of the respondent herein, neither the above petitioner or his counsel being present, and this cause was called for hearing on respondent's return. Thereupon it was by the Court ordered that this cause be continued until called up for hearing on said return. [40]

**Order of Submission of Demurrer to Return to Writ
of Habeas Corpus.**

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court, Monday, December 1, 1913, Vol. 8, Page
708.

(Title of Court and Cause.)

On this day came Messrs. A. A. Wilder and B. S. Ulrich, of the firm of Thompson, Wilder, Watson & Lymer, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States Attorney, on behalf of the respondent herein, and this cause was called for hearing on respondent's return. Thereupon a demurrer to the return herein having been filed and due argument having been had by respective counsel thereon, the said matter was by the Court taken under advisement and counsel ordered to file their briefs. [41]

*In the District Court of the United States, in and
for the District and Territory of Hawaii.*

In the Matter of the Application of WONG YUEN
for a Writ of Habeas Corpus.

Demurrer to the Return.

Comes now Ching Shai as the next friend of Wong Yuen, petitioner herein, by his attorneys, Thompson, Wilder, Watson & Lymer, and demurs to the return filed herein and for grounds of demurrer alleges as follows:

First: That the said return does not set forth facts which would justify the holding of the said Wong Yuen.

Second: That the said return does not show that any application setting forth the facts was made by the proper Immigration authorities for a warrant of arrest as is required by law, nor indeed, that any application at all was made for a warrant for the arrest of the said Wong Yuen.

Third: That the alleged warrant of arrest does not make sufficiently definite and certain the nature of the charge against the said Wong Yuen.

Fourth: That it does not appear in the said return that the said Wong Yuen was permitted to be released from custody upon the furnishing of a satisfactory bond as is expressly required in the said warrant of arrest and as is provided for by law.

Fifth: That it does not appear in the said return that the said Wong Yuen is an alien who has ever "entered the United States" within the meannig of the law herein provided.

Sixth: That it appears in the said return that the said Wong Yuen was deprived of his liberty without due process of law contrary to Article 5 of the amendments of the constitution of the United States.

Dated, Honolulu, Dec. 1st, A. D. 1913

THOMPSON, WILDER, WATSON &
LYMER.

By (Sgd.) B. S. U.,
Attorneys for Petitioner. [42]

[Endorsed]: No. 74. (Title of Court and Cause.)
Demurrer to the Return. Filed Dec. 1, 1913. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [43]

Order of Submission of March 16, 1914.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court, Monday, March 16, 1914, Vol. 9, Page 74.

(Title of Court and Cause.)

On this day came Mr. A. A. Wilder, of the firm of
Thompson, Wilder, Watson & Lymer, counsel for the
above applicant, and also came Mr. Jeff McCarn,
United States Attorney, on behalf of the respondent
herein, and this cause was called for hearing.
Thereupon and after due argument the said cause
was by the Court taken under advisement and counsel
herein ordered to file briefs. [44]

Order Continuing Argument to February 6, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District
Court, Saturday, January 30, 1915, Vol. 9, Page
482.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States
Attorney, on behalf of the respondent herein, neither
the above applicant or his counsel being present, and
this cause was called for argument. Thereupon on
motion of Mr. McCarn, it was by the Court ordered

that this cause be continued to February 6, 1915, at 10 o'clock A. M., for argument. [45]

Order Continuing Argument to February 13, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, February 6, 1915, Vol. 9, Page 496.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to February 13, 1915, at 10 o'clock A. M. for argument. [46]

Order Continuing Argument to February 27, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, February 13, 1915, Vol. 9, Page 509.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon on motion of Mr. McCarn, it was by the Court ordered that this cause be continued to February 27, 1915, at 10 o'clock A. M., for argument. [47]

Order Continuing Argument to March 6, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Friday, February 26, 1915, Vol. 9, Page 525.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, whereupon it appearing to the Court, that the above cause had been heretofore continued to February 27, 1915, at 10 o'clock A. M., for argument, it was by the Court ordered that the said cause be at this time continued to March 6, 1915, at 10 o'clock A. M., for such argument. [48]

Order Continuing Argument to March 13, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, March 6, 1915, Vol. 9, Page 536.

(Title of Court and Cause.)

The within cause being called on this day for argument and none of counsel for respective parties being present, it was by the Court ordered that this cause be continued to March 13, 1915, at 10 o'clock A. M., for argument. [49]

Order Continuing Argument to April 10, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, March 13, 1915, Vol. 9, Page 544.

(Title of Court and Cause.)

On this day came Mr. J. W. Thompson, Assistant United States Attorney, on behalf of the respondent herein, neither the above applicant nor his counsel being present and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to April 10, 1915, at 10 o'clock A. M. for argument. [50]

Order Continuing Argument to April 24, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, April 10, 1915, Vol. 9, Page 568.

(Title of Court and Cause.)

The within cause being called on this day for argument and none of counsel for the respective parties being present, it was by the Court ordered that this cause be continued to April 24, 1915, at 10 o'clock A. M., for argument. [51]

Order Continuing Argument to May 8, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, April 24, 1915, Vol. 9, Page 606.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to May 8, 1915, at 10 o'clock A. M., for argument. [52]

Order Continuing Argument to May 22, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, May 8, 1915, Vol. 9, Page 646.

(Title of Court and Cause.)

On this day came Mr. W. T. Carden of the firm of Thompson and Milverton, counsel for the above applicant and also came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to May 22, 1915, at 10 o'clock A. M., for argument. [53]

Order Continuing Argument to May 28, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Saturday, May 22, 1915, Vol. 9, Page 669.

(Title of Court and Cause.)

On this day came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, neither the above applicant or his counsel being present, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued to May 28, 1915, at 2 o'clock P. M., for argument. [54]

Order of Submission of May 28, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Friday, May 28, 1915, Vol. 9, Page 677.

(Title of Court and Cause.)

On this day came Mr. A. A. Wilder on behalf of the above applicant and also came Mr. Jeff McCarn, United States Attorney, on behalf of the respondent herein, and this cause was called for argument. Thereupon and after due argument by respective counsel, the Court ordered that the matters herein be submitted on briefs. [55]

Order Sustaining Demurrer to Return on Writ of Habeas Corpus.

(PROCEEDINGS AT DECISION ON DEMURRER TO RESPONDENT'S RETURN, ETC.)

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Monday, August 2, 1915, Vol. 9, Page 739.

(Title of Court and Cause.)

On this day came Mr. F. E. Thompson and Mr. A. A. Wilder, counsel for the above applicant, and also came Mr. J. W. Thompson, Assistant United States Attorney, on behalf of the respondent herein, and this cause was called for decision. Thereupon the Court read and filed its decision herein sustaining the demurrer of said applicant to respondent's return and allowing respondent until August 3, 1915, at 10 o'clock A. M., to contest petitioner's allegations of residence in Hawaii. [56]

In the United States District Court for the Territory of Hawaii.

April, A. D. 1915, Term.

No. 75.

In the Matter of the Application of SUI JOY for a Writ of Habeas Corpus.

(Also WONG YUEN, No. 74)

(Also CHING LUM, No. 73)

(Also KIMI YAMAMOTO, No. 91)

Opinion on Demurrer to Return to Writ of Habeas Corpus.

August 2, 1915.

Immigration — Deportation — Entering the United States: An alien who came to the Hawaiian Islands previous to their annexation to the United States, and was living there at the time of such annexation, cannot be said to "have entered the United States" within the meaning of section 3 of the act of February 20, 1907, as amended by the act of March 26, 1910, 36 Stat. 263.

Same — Same — Same — Actual landing subject to statutory conditions: The provisions of the said statute for the deportation of aliens found "to be unlawfully within the United States," presume an actual landing of such aliens, subject to the conditions as to conduct set forth in the statute.

Habeas Corpus: On demurrer to return.

THOMPSON, WILDER, WATSON & LYMER, for Petitioners SUI JOY, WONG YUEN and CHING LUM.

J. W. CATHCART, for Petitioner KIMI YAMAMOTO.

JEFF McCARN, United States District Attorney, for Respondent.

In the first three of the above cases demurrers to the petitions were overruled, whereupon the respond-

ent filed his returns which were demurred to by the petitioners, the fifth ground of demurrer being as follows: "That it does not appear in the said return that the said Sui Joy is an alien who has ever entered the United States within the meaning of the law herein provided." In the fourth case, the petitioner filed a traverse to the return of the respondent, in which, among other things, she raised the same point as raised on the fifth ground of the said demurrers, to wit, that she was not subject to the immigration laws of the United States, having come to the Hawaiian Islands while they were under the jurisdiction of the Republic of Hawaii.

The argument on this point is, briefly, that the petitioners, having come to the Hawaiian Islands previous to annexation, as alleged, and being domiciled residents here at the time of annexation, the statute does not apply to them, such persons, although aliens, not having "entered" the United States.

The following is the immigration rule applying to these cases:

"The application must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained. The application must be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where landing occurred), or a reason given for its absence, in which case effort should be made to supply the principal items of information

mentioned in the blank form provided for such certificates. Telegraphic application may be resorted to only in case of necessity, and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained.” Immigration Rule 22, subdivision 2. [57]

The statute under which the petitioners are held is a part of section 3 of the act of February 20, 1907, as amended by the act of March 26, 1910, 36 Stat. 263. It is as follows:

“Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution *after such alien shall have entered the United States*, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections 20 and 21 of this act.”

The demurrers are allowed on the fifth ground. It is obvious from a reading of division 2 of Immigration Rule 22, above quoted, that the Commissioner General of Immigration and the Secretary of Labor, who are authorized by the Immigration Act of February 20, 1907, 34 Stat. 898, sec. 22, to establish

rules for carrying out the provisions of the act, have construed the act on the point referred to, as meaning an actual entry or landing in the United States. The said division 2 of the 22d rule, in providing for an application by the immigration officers to the Secretary of Labor for authority to arrest an alien suspected of being unlawfully in the United States, requires, among other things, that the application "shall be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where the landing occurred), or a reason given for its absence." Of course this can refer to nothing else than an actual landing in the United States. This construction is rendered still more positive by the "certificate of landing," required by the rule to accompany the application. The bank form provided by the Secretary of Labor and the Commissioner [58] General of Immigration under the authority of the statute, is as follows:

"Form 564.

Certificate as to Landing of Alien

(To accompany application for warrant of arrest)

DEPARTMENT OF COMMERCE AND LABOR,
Immigration Service.

_____, 190

I hereby certify that I have examined the records of the immigrant station at — with reference to the record of the landing or entry of —, an alien, and that the following facts relative to such landing or entry are disclosed by said records.

- (1) Name of alien, —; age, —; sex, —;
- (2) Race, —; country whence alien came, —;

- (3) Exact date and port of arrival in the United States, —;
- (4) Name of vessel and line, _____
(If alien arrived via Canada or Mexico, so state.)
- (5) Destination, —
- (6) Occupation, —; money brought, \$—;
- (7) By whom passage paid, —;
- (8) Whether ever in United States before, —;
- (9) Whether inspected at time of arrival, —

(If held for special inquiry, so state.)

Remarks: _____

(Signature) _____,

(Official title) _____."

Such construction, being authoritative and official, is entitled to great weight. Endlich's Interpretation of Statutes, s. 357.

Counsel in the *Sui Joy*, *Ching Lum* and *Wong Yuen* cases, set forth somewhat exhaustively the constitutional argument that Congress derived its power to legislate as to immigrant aliens after being admitted, solely from section 8 of the first article of the Constitution of the United States, which gives it the power "to regulate commerce with foreign nations." Quoting from the brief, "the [59] theory is that commerce with foreign nations includes not only an exchange of commodities, but also the importation or incoming of passengers. The proposition that Congress has no power to regulate the affairs of individual persons in the United States, except as incidental to some one of the powers expressly given

to it by the Constitution, is fundamental." It follows therefore that whereas Congress may permit an alien immigrant to land under certain conditions as to conduct thereafter while in the country, involving forcible deportation upon his failure to conform to such conditions, it may not deport alien residents for similar conduct, with whom there has been no such conditional entry into the United States. In other words, an alien resident of the United States in regard to whom there was no condition as to his conduct during his residence, that was made the basis of his landing or entry into the country by a then existing statute, is not within the scope of section 3 of the Immigration Act of February 20, 1907, as amended by the act of March 26, 1910. Plainly the law does not affect persons who have not *entered* the United States previous to doing the acts charged. These petitioners all claim to have been living in Hawaii before and at the time of annexation. In matters of immigration the word *enter* has not acquired a technical meaning. It would appear that these cases might well have been disposed of on their inception, on the ground that the statute is too clear to require interpretation. "*Absoluta sententia expositore indiget*" Potter's Dwarris, 128; Vattel's first rule, id. 126.

As the ruling on this ground of the demurrer disposes of the cases, the court need not consider the [60] other grounds.

It is not clear whether there remains a question of fact to be decided. The returns in the first three cases do not specifically deny the allegations of resi-

dence in Hawaii before annexation, but make a general denial of all further allegations and averments of said petitions necessary to be denied. The return in the fourth case accepts the allegation of the petition in that case that the petitioner arrived in Hawaii in the year 1897, as correct. She (Kimi Yamamoto) is, therefore, under the foregoing conclusions, entitled to her discharge under the writ, which is hereby ordered.

If the respondent desires to contest the allegations of residence in Hawaii, in the three first cases, an opportunity will be given, otherwise such petitioners will be discharged.

(Sgd.) SANFORD B. DOLE,
Judge of the United States District Court for the
Territory of Hawaii. [61]

Supplementary Decision.

On the afternoon of the day the foregoing decision was given in open court, counsel on both sides filed the following stipulation:

“It is hereby stipulated and agreed by and between the United States of America through J. W. Thompson, its assistant District Attorney of the District and Territory of Hawaii, and Sui Joy, Ching Lum and Wong Yuen, by their attorneys, Thompson & Milverton, that each of said petitioners were residents of the Hawaiian Islands for a period of more than five (5) years prior to the 15th day of June, A. D. 1900.”

By which stipulation it would appear that the said petitioners were resident here for over three

years before the annexation of Hawaii to the United States, which took place August 12, 1898. The Court was thereupon prepared to order the discharge of the petitioners, according to the conclusions of the foregoing decision, but before such order was effectuated the assistant district attorney, acting for the respondent, moved the Court for an opportunity of showing that the petitioners severally visited China after annexation and returned again to Hawaii.

Such motion must be denied, inasmuch as the cases contain no pleadings which would form a basis for such testimony,—as there is no showing that such information is newly discovered and as such information, if it exists, obviously has been, during the pendency of these proceedings, within the reach of the respondent.

The writs are made absolute and the petitioners discharged.

(Sgd.) SANFORD B. DOLE,
Judge of the United States District Court for the
Territory of Hawaii.

Honolulu T. H., August 4, 1915. [62]

[Endorsed]: No. 74. (Title of Court and Cause.)
Decision of Dole, J., on Demurrer to Return. Filed
August 2, 1915. A. E. Murphy, Clerk. By (Sgd.)
F. L. Davis, Deputy Clerk, and Supplementary
Decision. Filed August 9, 1915. A. E. Murphy,
Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.
[63]

Order Continuing Cause to August 4, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Tuesday, August 3, 1915, Vol. 9, Page 741.

(Title of Court and Cause.)

On this day came Mr. F. E. Thompson of the firm of Thompson and Milverton, counsel for the above applicant, and also came Mr. J. W. Thompson, Assistant United States Attorney, on behalf of the respondent herein, and this cause was called for further disposition. Thereupon it was by the Court ordered that this cause be continued to August 4, 1915, at 10 o'clock A. M., for further disposition.
[64]

Order Discharging Petitioner, etc.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Wednesday, August 4, 1915, Vol. 9, Page 743.

(Title of Court and Cause.)

On this day came Mr. F. E. Thompson, of the firm of Thompson and Milverton, counsel for the above applicant, and also came Mr. J. W. Thompson, Assistant United States Attorney, on behalf of the respondent herein, and this cause was called for further disposition. Thereupon it appearing from the stipulation of counsel that the within applicant was a resident of the Hawaiian Islands for the period of more than five (5) years prior to the 15th day of

June, A. D. 1900, it was by the Court ordered that said applicant be discharged under the writ herein.

[65]

*In the United States District Court for the Territory
of Hawaii.*

October, A. D. 1915, Term.

No. 74.

In the Matter of the Application of WONG YUEN
for Writ of Habeas Corpus.

Judgment.

At the regular April, A. D. 1915, term of the District Court of the United States in and for the District and Territory of Hawaii, held in the courtroom of said court, city and county of Honolulu, in the Territory of Hawaii and the District aforesaid, on the 2d day of August, 1915, the above-entitled matter having heretofore been heard on the pleadings, evidence adduced before the Court, and argument of counsel for the respective parties, and due deliberation thereon, the Court finds that the above-named petitioner Wong Yuen is entitled to be discharged, subject to the taking of an appeal by the respondent herein, Richard L. Halsey, in which case the said applicant Wong Yuen will be required to give a recognizance with surety in the sum of \$500 to answer the judgment of the Appellate Court.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the above-named petitioner Wong Yuen be, and he is hereby discharged from custody herein, subject to the taking of an appeal,

and subject to exception by the United States of America. [66]

And the Court being advised that the above-entitled cause will be removed to the Appellate Court by proper proceedings to be had in that behalf, does hereby further order, adjudge and decree that the above-named Wong Yuen give his recognizance with surety in the sum and amount of \$500, to answer the judgment of the Appellate Court.

Given, made and dated at Honolulu, Territory and District aforesaid, this 16th day of December A. D., 1915.

(Sgd.) SANFORD B. DOLE,
Judge, U. S. District Court.

[Endorsed]: No. 74. (Title of Court and Cause.)
Judgment Entered in J. D. Book 2, at folio 655.
Filed Dec. 16, 1915. F. L. Davis, Clerk. By (Sgd.)
Ray B. Rietow, Deputy. [67]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of WONG YUEN, for
a Writ of Habeas Corpus.

Petition for Appeal.

To the Honorable CHARLES F. CLEMONS, Judge
of the Above-entitled Court:

The United States of America, by its attorney,
Horace W. Vaughan, conceiving itself aggrieved by
the order and judgment made and entered on the
16th day of December, A. D. 1915, in the above-en-

itled proceeding, does hereby appeal from the said order and judgment to the Circuit Court of Appeals for the Ninth Circuit, and files herewith its assignment of errors intended to be urged upon appeal, and it prays that its appeal may be allowed, and that a transcript of the record of all proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit of the United States.

Dated this 31 day of January, A. D. 1916.

(Sgd.) HORACE W. VAUGHAN,
United States Attorney.

Received a copy of the above petition:

By His Attorneys,

[68]

[Endorsed]: No. 74. (Title of Court and Cause.)
Petition for Appeal. Filed Feb. 15th, 1916. (Sgd.)
F. L. Davis, Clerk. [69]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of WONG YUEN, for
a Writ of Habeas Corpus.

Order Allowing Appeal.

Upon application and motion of Horace W. Vaughan, United States Attorney for the District and Territory of Hawaii:

IT IS HEREBY ORDERED, that the petition for appeal, heretofore filed herein by the United States

of America, be, and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment heretofore, on December 16th, 1915, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which said final order and judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the clerk of this court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California.

Dated, this 31 day of January, A. D. 1916.

(Sgd.) CHAS. F. CLEMONS,
Judge, U. S. District Court.

Received a copy of the above order:

_____,
By His Attorneys,
_____. [70]

[Endorsed]: No. 74. (Title of Court and Cause.)
Order Allowing Appeal. Filed February 15th, 1916.
(Sgd.) F. L. Davis, Clerk. [71]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of WONG YUEN, for
a Writ of Habeas Corpus.

Assignment of Errors.

And now comes the United States of America, by
Horace W. Vaughan, its attorney, and says that in

the record and proceedings in the above-entitled matter there is a manifest error and that the final record and judgment, made and entered in said matter on the 16th day of December, A. D. 1915, is erroneous and against the just rights of the said United States, in this, to wit:

I.

That the Court erred in assuming jurisdiction in this matter because it appears by the petition and record presented, that the writ was improperly issued.

II.

That because the rule of this court and the practice and rules of the Supreme Court of the United States and of the Circuit Court of Appeals for the Ninth Circuit, require that in matters of this kind a copy of the record upon which the warrants for deportation were issued, should accompany the petition, and that no such record was attached to the petition for the writ of habeas corpus, and by reason thereof, the said writ was improvidently and improperly issued. [72]

III.

That because the rule of court in this jurisdiction requires that the office of United States Attorney shall have notice of the application for a writ of habeas corpus one hour preceding the application therefor, and no such notice was served upon the United States Attorney or his assistant, or in said office; that therefore the writ was issued in violation of the rule of this court.

IV.

That the record as presented shows, from all the testimony adduced, that the petitioner was deriving benefit from the earnings of a prostitute, and that the finding thereon was conclusive upon this court and the court had no jurisdiction to inquire further into the facts of the case.

V.

That the Court erred in holding that because the petitioner, who was admitted to be an alien, and a citizen of the Republic of China, was without the Immigration Laws of the United States prohibiting the entrance of aliens, by reason of the fact that the petitioner had previously been a resident of the Kingdom or Republic of Hawaii and before the annexation of Hawaii to the United States or the taking effect of the Organic Act providing for the Territory of Hawaii.

VI.

That the Court erred in holding that because the petitioner had become a resident of Hawaii before the annexation of Hawaii to the United States, therefore petitioner did not come within the rules as prescribed by the statute against the entry of an alien found to be deriving benefit from the earnings of a prostitute. [73]

VII.

That the Court erred in refusing to hold that although the petitioner was admittedly an alien and a citizen of the Republic of China, the petitioner was not amenable to the prohibitive laws of entrance nor to the deportation laws of the United States.

VIII.

That the Court erred in holding that a Chinese citizen of the Republic of China, although domiciled in the Territory of Hawaii before the annexation thereof to the United States of America, was not amenable to deportation, although proven to be receiving the proceeds of earnings by a prostitute, and that because the petitioner had been in the Territory of Hawaii before annexation, he was privileged, although an alien and a citizen of the Republic of China, to receive the earnings of a prostitute and not be amenable to the laws of the United States providing for the deportation of an alien so receiving such earnings.

IX.

That in any proceedings upon the hearing, such as was had, the Court was without authority of law and a hearing under said petition and a ruling of the Court made upon such hearing was trenching upon the duties of the executive branch of the Government.

WHEREAS, by the law of the land, the said application for a writ of habeas corpus should have been denied, and the said writ of habeas corpus should have been discharged, and the said applicant and petitioner should have been remanded to be dealt with according to law. [74]

And the aforesaid United States of America now prays that the order and judgment of December 16th, 1915, hereinabove mentioned, may be reversed, annulled, and held for naught, and that it, said

United States, may have such other and further relief as may be proper in the premises.

Dated, this 31 day of January, A. D. 1916.

(Sgd.) HORACE W. VAUGHAN,

United States Attorney.

Received a copy of the above Assignment of Errors:

By _____.

His Attorneys.

[Endorsed]: No. 74. (Title of Court and Cause.)
Assignment of Errors. Filed Feb. 15th, 1916.
(Sgd.) F. L. Davis, Clerk. [75]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of WONG YUEN, for
a Writ of Habeas Corpus.

Citation on Appeal.

United States of America,—ss.

The President of the United States, to Wong Yuen,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the Territory of Hawaii, wherein the United States of America is

appellant, and you, Wong Yuen, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United [76] States of America, this — day of January, A. D. 1916, and of the Independence of the United States the one hundred and fortieth.

CHAS. F. CLEMONS,
Judge, U. S. District Court.

Attest: F. L. DAVIS,
Clerk, U. S. District Court.

Received a copy of the within citation:

By His Attorneys,

_____. [77]

[Endorsed]: No. 74. In the District Court of the United States for the Territory of Hawaii. In the Matter of the Petition of Wong Yuen for a Writ of Habeas Corpus. Citation on Appeal. Filed February 15th, 1916. F. L. Davis, Clerk. By _____, Deputy.

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of WONG YUEN, for
a Writ of Habeas Corpus.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition, Order and Writ of Habeas Corpus; filed October 18, 1913.
2. Bond; filed October 18, 1913.
3. Demurrer to Petition; filed October 22, 1913.
4. Decision on Demurrer to Petition; filed October 25, 1913.
5. Return of Richard L. Halsey to Writ of Habeas Corpus; filed October 28, 1913.
6. Demurrer to the Return; filed December 1, 1913.
7. Decision on Demurrer to Return; filed August 2, 1915.
8. Supplementary Decision; filed August 9, 1915.
9. Judgment; filed December 16, 1915.
10. Petition for Appeal; filed February 15, 1916.
11. Order Allowing Appeal; filed February 15, 1916.
12. Assignment of Errors; filed February 15, 1916.
13. Citation on Appeal; filed February 15, 1916.

14. All minute entries in above-entitled cause.
[78]

15. This Praecipe.

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of said Circuit Court of Appeals at San Francisco, before the 15th day of March, 15, A. D. 1916.

THE UNITED STATES OF AMERICA,
By (Sgd.) HORACE W. VAUGHAN,
United States Attorney.

[Endorsed]: No. 74. (Title of Court and Cause.)
Praecipe for Transcript. Filed Feb. 15th, 1916.
(Sgd.) F. L. Davis, Clerk. [79]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 74.

In the Matter of the Petition of WONG YUEN, for
a Writ of Habeas Corpus.

**Certificate of Clerk, U. S. District Court to
Transcript of Record.**

United States of America,
District of Hawaii,—ss.

I, George R. Clark, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 80, inclusive, to be a true and complete transcript of the record and proceedings had in said

court in the matter of the petition of Wong Yuen for a writ of habeas corpus, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal and three (3) orders extending time to transmit record on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$20.55, and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 23d day of May, A. D. 1916.

[Seal]

GEORGE R. CLARK,
Clerk, United States District Court, Territory of
Hawaii. [80]

[Endorsed]: No. 2801. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Wong Yuen, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed June 2, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

NO. 2801

UNITED STATES OF AMERICA,
Appellant.

vs.

WONG YUEN,

Appellee.

PETITION FOR REHEARING

E. A. MOTT-SMITH,

W. L. STANLEY,

Counsel for Appellee.

Filed

MAR 2-1917

E. D. Monckton;

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2801

UNITED STATES OF AMERICA,	}
Appellant,	
vs.	
WONG YUEN,	
Appellee.	

PETITION FOR REHEARING.

The appellee respectfully petitions that a rehearing be granted for the following reasons:—

1. That the court erred in its Opinion filed herein on the 5th day of February, 1917, and the said Opinion was based upon a misconception of the undisputed facts appearing in the record herein, in so far as it remanded the above cause to the District Court of the United States in and for the Territory of Hawaii with instructions to remand the appellee *for deportation*, because it appears from the said record that the said cause came to this court on appeal from the judgment of the said District Court sustaining the appellee's demurrer to the return of the appellant to the appellee's petition for a writ of habeas corpus, which writ was issued upon the arrest

of the appellee by the Immigration officers at Honolulu upon the charge of a violation of Section 3 of the Immigration Act, and before any hearing had been given to the appellee on the charges upon which the arrest was based ;

2. That, as appears by the said record, no hearing has up to the date hereof been given to the appellee by the said or any Immigration officers on the charges upon which his arrest was based, and that no determination has been made by the said or any Immigration officers or by any official or officials of the Department of Labor either as to the guilt or innocence of the appellee on the said charge or as to whether the appellee should or should not be deported ;

3. That the appellee cannot lawfully be deported until he has been given a hearing by the Immigration officer or officers at Honolulu on the charges upon which his arrest was based, nor until a decision adverse to the appellee has been rendered by the Department of Labor upon the recommendation of the said officer or officers ;

4. That the court, we think, overlooked the argument of the appellee that, it being an admitted fact that the appellee was a bona fide resident of the Hawaiian Islands at the time the same were annexed to the United States, the Hawaiian Islands were the country whence the appellee came into the United States; and that as by Sections 20 and 21 of the Immigration Act an alien can lawfully only be deported "to the country whence he came," and the country whence the appellee came to the United States is now

an integral part of the United States, he cannot lawfully be deported therefrom, and there is no country to which he can lawfully be deported. That the effect of sustaining this argument of the appellee would necessarily be the affirmance of the judgment of the District Court.

Dated Honolulu, T. H.,

February 24, 1917.

E. A. MOTT-SMITH,
W. L. STANLEY,
Counsel for Appellee.

I hereby certify that in my opinion there is good ground in law for a rehearing in the above entitled cause, and that this petition is not filed for the purpose of delay.

W. L. STANLEY.



